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July 3, 2008

VIA E-MAIL AND FEDEX

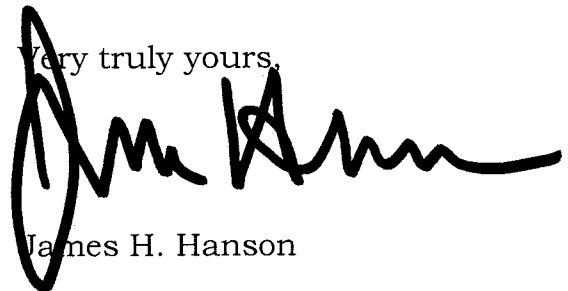
Mr. John H. Hill
U.S. Department of Transportation
Federal Motor Carrier Safety Administration
400 7th Street SW
Washington, DC 20590

Re: Petition for Review

Dear Administrator Hill:

Enclosed for filing is a petition for review and decision by the Federal Motor Carrier Safety Administration, which is filed pursuant to 49 U.S.C. § 31141, 49 C.F.R. Part 355, and 49 C.F.R. Part 389. Please return a date-stamped copy to me in the enclosed, self-addressed stamped envelope. Thank you for your cooperation. If you have any questions, please contact me.

Very truly yours,



James H. Hanson

JHH:bl
Enclosure
cc: Larry Minor (w/ encl.)
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**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In re the Matter of California's Meal and Rest)
Break Requirements on Interstate Drivers of)
Commercial Motor Vehicles)**

Petition of Affinity Logistics, Corp., Cardinal Logistics Management Corporation, C.R. England, Inc., Diakon Logistics (Delaware), Inc., Estenson Logistics, LLC, McLane Company, Inc., McLane/Suneast, Inc., Penske Logistics, LLC, Penske Truck Leasing Co., L.P., Trimac Transportation Services (Western), Inc., and Velocity Express, Inc. for Determination that Certain California Statutory and Regulatory Requirements Imposing Meal and Rest Break Obligations on Interstate Drivers of Commercial Motor Vehicles are Preempted by the Federal Hours of Service Regulations

July 3, 2008

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Petitioners, Affinity Logistics, Corp., Cardinal Logistics Management Corporation, C.R. England, Inc., Diakon Logistics (Delaware), Inc., Estenson Logistics, LLC, McLane Company, Inc., McLane/Suneast, Inc., Penske Logistics, LLC, Penske Truck Leasing Co., L.P., Trimac Transportation Services (Western), Inc., and Velocity Express, Inc. hereby petition the U.S. Department of Transportation (“DOT”), Federal Motor Carrier Safety Administration (“FMCSA”), for a declaration that certain requirements imposed by California statute (Cal. Labor Code § 512(a)) (Exhibit A), regulation (Cal. Code Regs. tit 8, § 11090) (Exhibit B), and California Industrial Welfare Commission (“IWC”) wage orders related to all employees working in the transportation industry (IWC Transportation Wage Order No. 9) (Exhibit C) (collectively, the “Meal and Rest Break Rules”) are preempted to the extent that they are applied to drivers subject to the Federal Hours of Service Regulations as set forth at 49 C.F.R. Part 395 (the “HOS Regulations”). Due to the risk of irreparable harm to Petitioners in particular and to interstate motor carriers operating in California in general, Petitioners request that the FMCSA determine that the Meal and Rest Break Rules are preempted under 49 U.S.C. § 31141, and that it exercise its authority under 49 C.F.R. Part 389 to expeditiously issue a final rule declaring the Meal and Rest Break Rules are preempted from being applied to drivers subject to the HOS Regulations.

I. **INTRODUCTION**

Congress has declared an express interest in uniform regulation of commercial motor vehicle (“CMV”) safety. 49 U.S.C. § 31131(b)(2). To facilitate this interest, Congress developed complementary schemes to both prohibit states from enforcing *any* incompatible regulation or law on CMV safety in interstate commerce and limit states’ authority over CMV safety in intrastate commerce by restricting funding for states that adopt incompatible safety regulations. These efforts have been so effective that, according to Petitioners’ research, all 50 states have adopted the Federal Motor Carrier Safety Regulations (“FMCSRs”) with respect to intrastate operations (subject to the tolerance guidelines allowing limited variances).

The FMCSA is now responsible for the FMCSRs, 49 C.F.R. Parts 40, 383, 383, 387, 390-97, and 399, which include the HOS Regulations, and has the authority to review and preempt state laws relating to CMV safety.¹ The federal government has regulated hours of service of drivers operating in interstate commerce for over 70 years. Today, the motor carrier industry is heavily involved in working with the FMCSA to develop HOS Regulations that balance the practicalities of the industry with the FMCSA’s overarching safety concerns. The importance that the motor carrier industry places on the HOS Regulations is illustrated by the volume of interest any proposed revision to the HOS Regulations garners. There are over 23,700 docket

¹ Effective January 1, 1996, Congress transferred safety regulatory authority, including authority over hours of service, from the Interstate Commerce Commission to the Secretary of Transportation, who delegated that authority initially to the Federal Highway Administration (“FHWA”) and, in 1999, to the newly created FMCSA. See 49 U.S.C. § 113(f); 49 C.F.R. § 1.73(g), (l).

entries available for the 1997 proposal to amend the HOS Regulations at www.regulations.gov. The FMCSA considers not only industry comments, but also scientific studies in ensuring that the HOS Regulations are grounded in sound science as well as practical considerations. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25540, 25550 (May 2, 2000).

The FMCSA also takes steps to educate the industry with respect to the requirements imposed by the HOS Regulations. The FMCSA's website includes a link for the HOS Regulations. At that link are charts explaining the HOS Regulations, as well as links for a "Driver's Pocket Guide," and an "HOS Presentation" among other things. See <http://www.fmcsa.dot.gov/rules-regulations/topics/hos/HOS-2005.htm> (last checked July 3, 2008).

The federal government and the motor carrier industry have come to rely on the HOS Regulations as the sole authority governing the limitations on hours of service of a CMV driver operating in interstate commerce. In fact, the FMCSA has expressly stated its interest in ensuring that drivers are subject to the same limitations on hours of service in each state. Hours of Service of Drivers, 72 Fed. Reg. 71247, 71249 (Dec. 17, 2007) ("HOS IFR").² Unfortunately, most frequently in the last two years, numerous lawsuits have been filed in state and federal courts, primarily by attorneys requesting class action certification and seeking damages for motor carrier employers' alleged noncompliance with California's Meal and Rest Break Rules. These lawsuits have resulted in large damage awards.³ Interstate motor carriers have not been immune to such suits. In fact Petitioners have all been sued in California in putative class action lawsuits for alleged violation of the Meal and Rest Break Rules.

² The HOS Regulations apply to drivers in interstate commerce, but a driver need not cross state lines to be operating in interstate commerce. According to 49 C.F.R. § 390.5, which defines the term "interstate commerce," a driver picking up a container at a California port for delivery in California, or picking up goods in California for delivery in California where the goods originated outside of California, is operating in interstate commerce.

³ The rash of Meal and Rest Break Rule cases filed in California courts was cited in a veto message issued by Governor Schwarzenegger on September 28, 2004, with respect to a bill that would have revised the Meal and Rest Break Rules. In it, he stated:

Inconsistent interpretation of [the Meal and Rest Break Rules] has created confusion relative to when and how employers must provide meal and rest periods to their employees. This confusion has left many employers facing steep penalties for failing to adhere to the law, even if they believe they have met all required mandates. In addition, increased penalties for failing to provide necessary meal and rest periods have, unfortunately, provided incentive for some to take advantage of the confusion in this area in the hope of securing hefty awards from employers.

Veto Message accompanying A.B. 3018, 2004 Assem. (Cal. 2004) available at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_3001-3050/ab_3018_vt_20040928.html (last checked July 3, 2008). The motor carrier industry has certainly not been immune from such suits.

Applying the Meal and Rest Break Rules to drivers subject to the HOS Regulations imposes limitations on a driver's time that are different from and more stringent than the HOS Regulations because the Meal and Rest Break Rules limit the amount of hours available to a driver to complete driving duties after initially coming on-duty to less than the 14 hours permitted by the HOS Regulations. Moreover, the Meal and Rest Break Rules do not allow for the flexibility provided by the HOS Regulations, further exacerbating the effect of the limitations imposed by the Meal and Rest Break Rules. This lack of flexibility not only hinders operations from a scheduling standpoint, it also creates serious safety concerns. Specifically, by imposing meal and rest breaks at set times, the Meal and Rest Break Rules limit a driver's ability to take breaks when they are actually needed. A driver subject only to the HOS Regulations, on the other hand, is not subject to externally imposed limitations and is instead able to take breaks when he or she deems necessary. Presumably, the number of drivers affected by this issue is in the tens of thousands. Thus, the current rash of lawsuits has the practical effect of forcing motor carriers to comply with the less flexible and more stringent Meal and Rest Break Rules in order to avoid liability to employees thereunder notwithstanding the fact that the industry has operated under and relied on the HOS Regulations for decades.

To remedy this situation, Petitioners are requesting that the FMCSA take immediate action and exercise its statutory and regulatory authority to pronounce the Meal and Rest Break Rules preempted as applied to drivers subject to the HOS Regulations pursuant to the authorities of 49 U.S.C. § 31141 and 49 C.F.R. Part 355. Failure of the FMCSA to take this action will result in *de facto* regulation of the hours of service of interstate drivers under the more restrictive Meal and Rest Break Rules and signal the way for other states to adopt their own statutes and regulations having the same restrictive impact and creating an unworkable patchwork quilt of laws governing the hours of services of interstate drivers of CMVs.

II.

INTERESTS OF THE PETITIONERS

The Meal and Rest Break Rules do not include an exemption for drivers operating for interstate motor carriers, and as mentioned above, interstate motor carriers have been sued for violating the Meal and Rest Break Rules. Each individual Petitioner, and/or a 100% commonly owned affiliate, operates as a motor carrier in interstate commerce. As such, each Petitioner is subject to the HOS Regulations. See 49 C.F.R. § 395.1(a)(1) (stating that the HOS Regulations apply to "motor carriers"). Each Petitioner has drivers who are domiciled in California and/or operate in California. As such, all Petitioners are under threat in these class action lawsuits with large damage awards, not to mention defense costs and attorney fees that will be incurred to defend these lawsuits, if they do not comply with the Meal and Rest Break Rules and are therefore interested persons for purposes of 49 U.S.C. § 31141(g).

III.

COMPETING STATE AND FEDERAL REQUIREMENTS

A.

Meal and Rest Break Rules

The meal break portion of the Meal and Rest Break Rules applies as follows:

1. No employer may employ any person for a work period of more than five hours without a meal period of not less than 30 minutes, except that if the employee's work will be completed within six hours, the meal period can be waived upon mutual consent of the employer and employee. Cal. Labor Code § 512(a); Cal. Code Regs. tit. 8, § 11090(11)(A); IWC Transportation Wage Order No. 9, § 11(A);
2. An employer may not employ an employee for a work period of more than 10 hours without providing the employee a second meal break of at least 30 minutes except that, if the work day is no more than 12 hours, then the second meal period may be waived by mutual consent so long as the first meal break was not waived. If the total hours worked exceeds 12 hours, the second meal period may not be waived. Cal. Labor Code § 512(a); Cal. Code Regs. tit. 8, § 11090(11)(B); IWC Transportation Wage Order No. 9, § 11(B).
3. Meal periods are considered "on-duty" unless the employee is relieved of all duty during the meal period. An on-duty meal period must be "counted as time worked." On-duty meal periods are only allowed when the nature of the work prevents the employee from being relieved of all duty and when an on-duty meal period is agreed to in writing by the employer and employee. The writing must state that the employee has the right to rescind the agreement at any time. Cal. Code Regs. tit. 8, § 11090(11)(C); IWC Transportation Wage Order No. 9, § 11(C).
4. If an employer fails to provide a meal period as required, the employer shall pay the employee one hour of pay for each work day for which a break was not provided. Cal. Labor Code § 226.7; Cal. Code Regs. tit. 8, § 11090(11)(D); IWC Transportation Wage Order No. 9, § 11(D);

The rest break portion of the Meal and Rest Break Rules applies as follows:

1. An employer must authorize and permit all employees to take rest periods, insofar as practicable, in the middle of each work period, of 10 minutes of break time for each four hours worked. Cal. Code Regs. tit. 8, § 11090(12)(A); IWC Transportation Wage Order, No. 9, § 12(A).
2. An employer failing to comply is again responsible to the employee for one hour of pay for each work day that rest periods were not provided. Cal. Code Regs. tit. 8, § 11090(12)(B); IWC Transportation Wage Order, No. 9, § 12(B).

Courts addressing meal and rest break claims have not been able to come to a uniform conclusion as to whether the employer meets its duty under the rules by *providing* meal breaks, or *ensuring* that employees take the breaks. At least one California appellate court, relying on an opinion letter from the California Division of Labor Standards Enforcement (“DLSE”), has stated that a motor carrier had not met its obligation to provide meal periods because it had “an affirmative obligation to *ensure* that workers are actually relieved of all duty.” Cicairos v. Summit Logistics, Inc., 133 Cal. App.4th 949, 962-63 (2006) (emphasis added) (citing Dept. of Industrial Relations, DLSE, Opinion Letter No. 2002.01.28 (Jan. 28, 2002)). Thus, while motor carriers, and other defendants, continue to argue that the Meal and Rest Break Rules do not require that the employer *ensure* that breaks are taken, and while some favorable preliminary rulings have been obtained,⁴ the fact of the matter is that, practically speaking, motor carriers must *ensure* that their drivers take meal breaks in order to be certain that they will not be in violation of the Meal and Rest Break Rules in light of decisions such as Cicairos.

While the standard for rest breaks (as opposed to meal breaks) is stated permissively, it has been held that an employer is required to provide its employees with rest breaks. See e.g., Corder v. Houston’s Restaurants, Inc., 424 F.Supp.2d 1205, 1208 (C.D.Cal. 2006) (stating that employers have no discretion in granting rest breaks). In Cicairos, the appellate court held that the carrier did not meet its obligation to *permit* drivers to take rest breaks because the computer log system the drivers used did not include a code for rest breaks, so drivers “felt pressured not to take their rest breaks.” Cicairos, 133 Cal. App.4th at 963. Thus, it was held that a motor carrier that passively discouraged rest breaks, simply by failing to have a rest break code in its electronic log system, had failed to *permit* its drivers to take rest breaks. Again, the practical effect of these holding is to require that a motor carrier *ensure* that its drivers take rest breaks in order to avoid running afoul of the Meal and Rest Break Rules and the threat of class action lawsuits.

B. **HOS Regulations**

For purposes of this analysis, the current HOS rules can be broken down into a few simple rules.

1. A driver may not drive after the 14th consecutive hour of coming on-duty. 49 C.F.R. § 395.3(a)(2). On-duty time includes, but is not limited to, time spent waiting at plants or terminals, loading and unloading, inspecting equipment, driving, complying with drug testing obligations, or performing any other work for the carrier. Id. at § 395.2.

⁴ Brown v. Federal Express Corp., 2008 WL 906517 *6 (C.D. Cal. Feb. 26, 2008); White v. Starbucks Corp., 497 F.Supp.2d 1080 (N.D. Cal. 2007); Kenny v. Supercuts, Inc., No. C06-07521 CRB, 2008 WL 2265194 (N.D. Cal. June 2, 2008).

2. During the 14 consecutive hours of daily on-duty time, the driver is entitled to spend 11 hours actually driving. Id. at § 395.3(a)(1).⁵
3. Both the motor carrier and the driver are prohibited from violating the foregoing obligations. 49 C.F.R. § 395.3(a).
4. Off-duty breaks taken during the day (e.g., meal, rest breaks, etc.) do not toll the prohibition on driving after the 14th consecutive hour of coming on-duty. See id. at § 395.3(a)(2) (prohibiting a driver from driving after the 14th hour of coming on duty without respect to whether any time during such 14-hour period was off-duty).
5. A driver must have at least 10 consecutive hours of off-duty time before being allowed to drive after 14 hours of coming on duty. See id. at § 395.3(a)(1)-(2).

C. Illustrations

The HOS Regulations allow a driver to drive for up to 11 hours anytime within the 14 hours of initially coming on duty. 49 C.F.R. § 395.3(a)(1)-(2). There is no prohibition against the driver remaining on duty during the three non-driving hours, nor is there any requirement that the driver take or be allowed to take any off-duty time.

The HOS Regulations also contain a list of numerous activities other than driving that qualify as on duty time.⁶ Subject to certain exceptions (including drivers operating within a 100

⁵ The Federal Circuit Court of Appeals for the D.C. Circuit struck down the 11-hour driving limit on procedural grounds. Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188 (D.C.Cir. 2007). The court stayed enforcement of its judgment until December 27, 2007. HOS IFR, 72 Fed. Reg. at 71251. On December 17, 2007, the FMCSA published an Interim Final Rule which, in part, readopted the 11-hour driving time limit. Id. at 71249 (stating that the 11-hour limit “must be preserved”). A final rule has yet to be published, however, meaning that there is a possibility that the previous 10-hour driving limit will be retained. Reverting to the 10-hour driving limit will not affect the analysis herein. The Meal and Rest Break Rules limit the 14-hour on-duty period during which the driver is able to accrue the permitted driving hours (whether 10 or 11 hours). Because the HOS IFR adopts the 11-hour limit, the 11-hour limit is used throughout this Petition.

⁶ The categories of on duty time, excluding driving time, are: (1) time at a plant, terminal, facility, or other property of a motor carrier or shipper, or any public property, waiting to be dispatched, unless the driver has been relieved of duty by the motor carrier; (2) all time inspecting, servicing, or conditioning any commercial motor vehicle at any time; (3) all time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth; (4) all time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded; (5) all time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle; (6) all time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post accident, or follow-up testing requirement of Continued

air mile radius of their work reporting location), such on duty not driving time must be recorded in the federally-required log book. 49 C.F.R. § 395.8(h)(4).

In the absence of the Meal and Rest Break Rules, a driver could spend three non-driving hours engaged in any of these activities and could still drive for 11 hours under the HOS Regulations. In California, due to the Meal and Rest Break Rules, however, the driver loses 1½ hours (two 30-minute meal breaks and three 10-minute rest breaks) over the course of the permitted 14-hour on-duty period in which the driver can neither drive nor perform on-duty not driving tasks. The practical effect is that a driver in California has only 12½ hours of on-duty time after initially coming on duty during which he/she can accumulate his/her 11 hours of driving time, leaving only 1½ hours to perform any on duty non-driving tasks that might naturally occur during the day.

Petitioners do not contend that the typical driver utilizes the full complement of on-duty hours during which he or she is allowed to drive each day. Nor do Petitioners take the position that drivers should not take meal and rest breaks. Indeed, the FMCSA contemplated that drivers would take meal and rest breaks when adopting the 14-hour limit. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. 22456, 22501 (April 28, 2003). Still, even if the driver does not work a full 14-hour day, he or she still loses potential driving time in direct correlation to the time required to take breaks under the Meal and Rest Break Rules. This contrasts with, and is more stringent than, the HOS Regulations, which allow the driver to drive for 11 hours during any part of the initial 14 hours after coming on duty and which also give the driver 3 hours during that 14-hour period during which to perform on duty non-driving tasks. Moreover, the inflexible nature of the Meal and Rest Break Rules not only interferes with motor carrier scheduling and operations, it also decreases the likelihood that a driver will have time to take breaks when necessary as determined by the driver.

Motor carrier operations are carefully timed to take advantage of the flexibility available under the HOS Regulations and, in some instances, to take advantage of the full complement of driving hours provided as well. Some carriers schedule driver meals to take place at carrier facilities once the driver has delivered a load so that unloading, sorting, and loading of outbound shipments can take place during the break. The Meal and Rest Break Rules, by mandating when meal breaks must be taken, interfere with such arrangements, meaning that the driver will miss the inbound appointment, which in turn has the domino effect of delaying outbound operations. This scenario is of particular concern in the less-than-truckload (“LTL”) segment of the industry where drivers make local pick-ups for delivery to terminals from which shipments are consolidated and transferred to linehaul drivers for same-day departure. Indeed, the FMCSA noted in its 2003 final rule that “Most LTL carriers reported that runs are generally scheduled so they can be completed within 12 hours with no more than 10 hours driving. They need the extra two hours, however, to deal with exigencies.” Hours of Service of Drivers, 68 Fed. Reg. at 22468.

49 C.F.R. Part 382, when directed by a motor carrier; (7) performing any other work in the capacity, employ, or service of a motor carrier; and (8) performing any compensated work for a person who is not a motor carrier. 49 C.F.R. § 395.2.

The foregoing is a very brief and general discussion of the everyday scenarios for incompatible application of the Meal and Rest Break Rules. A few specific illustrations of the application of these competing standards further demonstrate the real world effect of the interplay of the standards. Importantly, the illustrations each assume that a meal or rest break takes only as long as the break itself. However, as a practical matter, since the driver must be fully relieved of duty during the break, breaks will take much longer as the driver will be required to find a place to pull over and must actually park and shut down the equipment before the break can start. Of course, this will require that the driver return to the equipment, start it, and get back on the road as well. Thus, as a practical matter, the Meal and Rest Break Rules impose a much greater burden on the driver than a simple reading of the rules (or of the illustrations) would at first suggest, and the burden is exacerbated in congested areas.

Example 1: A driver handles a regularly-scheduled roundtrip route with a destination five hours from the origin. The driver is required to assist in the unloading and it takes three hours to do so. In addition, the driver spends the first 15 minutes and last 15 minutes of his on-duty time performing pre-trip and post-trip inspections. Assuming no variances, the driver is able to complete the delivery and return so that he can spend the night in his own bed as opposed to his sleeper berth or a motel because he will use 10 driving hours within the first 13½ hours of coming on duty.

Under the Meal and Rest Break Rules, however, the driver will not be able to return home. Instead, he must take a half hour meal break 15 minutes prior to arriving at the destination because he will have been on-duty for five hours and 15 minutes by the time he would have arrived at the destination. Since he has to assist in the unloading, he cannot take a second meal break until unloading is completed, which he does in order to comply with the Meal and Rest Break Rules. In addition, he is required to take three rest periods throughout the day. By adding 90 minutes of off-duty time to his day (two half hour meal breaks and three 10-minute rest breaks), he is now unable to return home within 14 hours of originally coming on-duty (10 hours of driving, plus three hours of unloading, plus 30 minutes of on-duty pre-trip and post-trip inspections, plus 1½ hours of off-duty time required by the Meal and Rest Break Rules, but not the HOS Regulations) and must instead sleep in his sleeper berth or a motel, or otherwise take 10 consecutive off-duty hours before returning home.

Example 2: Assume a driver is hauling an interstate load in California that is destined for delivery at 2:00 P.M. the following afternoon. Because the driver is out of driving time, he stops at a rest stop that is seven hours from his destination at 9:00 P.M. Before he can begin driving again, he must have 10 consecutive off-duty hours; thus, he cannot drive again until 7:00 A.M. If the driver departs at 7:00 A.M., he can drive for seven hours straight and make his 2:00 P.M. delivery appointment. However, under the Meal and Rest Break Rules, he must take two off-duty breaks during these seven hours, one 30-minute meal break and one 10-

minute rest break, making it impossible for him to make his 2:00 P.M. delivery appointment.

Example 3: Assume an over-the-road driver works from a motor carrier's terminal located in southern California. The driver generally makes deliveries in the eastern half of the United States. The driver may then receive loads to other parts of the country and ultimately a return load to southern California. Because the driver is a California employee, he is still required to take the meal and rest breaks throughout his trip even though he spends just the first few and last few hours of his week-long trip in California. Instead of working within the set guidelines of the HOS Regulations, the driver must constantly adjust his pick-up, delivery and driving schedule to take the off-duty meal and rest breaks throughout his trip.

Example 4: Motor carrier dispatchers are responsible for scheduling motor carrier operations and must do so while ensuring that drivers can complete scheduled operations within the confines of the HOS Regulations. This in and of itself is a difficult task given the fact that different drivers are operating around the clock as opposed to during set shifts. Imposing the Meal and Rest Break Rules on California-based drivers greatly increases the burden on dispatchers with responsibility for California-based drivers, and the burden is multiplied with respect to dispatchers responsible for drivers based in multiple states where only some of the drivers are based in California. Dispatchers would be forced to take not only the HOS Regulations into account in establishing drivers' schedules, but also whether a California-based driver could complete his/her obligations in light of the Meal and Rest Break Rules. The added complexity of imposing Meal and Rest Break requirements on California-based drivers only increases the possibility that dispatchers will make a mistake when scheduling drivers, increasing the potential for noncompliance with the HOS Regulations, and having to cancel scheduled pick-ups and deliveries because the miscalculation of schedules for California-based drivers.

These examples demonstrate that the Meal and Rest Break Rules place different requirements on drivers than the HOS Regulations. Among other things, drivers are forced to pull over for meal and rest breaks, when they could otherwise be driving, alter pick-up and delivery times, and limit the number of "on duty" hours available to a driver during which to accrue 11 hours of driving. As a result, the Meal and Rest Break Rules are incompatible with the HOS Regulations.

IV. **FEDERAL PREEMPTION AUTHORITY**

A. **Legal Standard For Preemption**

The DOT, and the FMCSA by delegation, has authority to preempt certain state laws affecting CMV safety. The basis for this authority is found at 49 U.S.C. § 31141, which reads in pertinent part as follows:

(a) Preemption after decision.--A State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced . . .

(c) Review and decisions by secretary.--

(1) Review.--The Secretary shall review State laws and regulations on commercial motor vehicle safety. The Secretary shall decide whether the State law or regulation--

(A) has the same effect as a regulation prescribed by the Secretary under section 31136;⁷

(B) is less stringent than such regulation; or

(C) is additional to or more stringent than such regulation . . .

(4) Additional or more stringent regulations.--If the Secretary decides a State law or regulation is additional to or more stringent than a regulation prescribed by the Secretary under section 31136 of this title, the State law or regulation may be enforced unless the Secretary also decides that-- . . .

(B) the State law or regulation is incompatible with the regulation prescribed by the Secretary; or

(C) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce.

(5) Consideration of effect on interstate commerce.—In deciding under paragraph (4) whether a State law or regulation will cause an unreasonable burden on interstate commerce, the Secretary may consider the effect on interstate commerce of implementation of that law or regulation with the implementation of all similar laws and regulations of other States.

⁷ The HOS Regulations are promulgated, in part under the authority of 49 U.S.C. § 31136. Hours of Service of Drivers, 70 Fed. Reg. 49978, 49979 (Aug. 25, 2005). Thus, any state law or regulation conflicting with the HOS Regulations is subject to review under 49 U.S.C. § 31141.

(g) Initiating Review Proceedings.—To review a State law or regulation on commercial motor vehicle safety under this section, the Secretary may initiate a regulatory proceeding on the Secretary’s own initiative or on petition of an interested person (including a State).

The Meal and Rest Break Rules are more stringent than the HOS Regulations because they prohibit drivers from driving at times that they could otherwise drive under the HOS Regulations and limit the total time during the work day during which a driver can drive or otherwise perform on-duty, non-driving tasks. As a more stringent standard, the Meal and Rest Break Rules cannot be enforced if they are incompatible with a regulation prescribed by the FMCSA, including the HOS Regulations. 49 U.S.C. § 31141(c)(4)(B). The regulations at 49 C.F.R. Part 355 govern preemption determinations by the FMCSA under 49 U.S.C. § 31141 and, for purposes of this analysis, state as follows:

Compatible or Compatibility means that state laws and regulations applicable to interstate commerce and to intrastate movement of hazardous materials are identical to the [FMCSRs] and the [Hazardous Material Regulations (“HMRs”)] or have the same effect as the [FMCSRs].

49 C.F.R. § 355.5 (emphasis added). Likewise, more stringent standards cannot be enforced if they create an undue burden on interstate commerce. In light of the FMCSA’s mandate that drivers be subject to the same limitations on hours of service in each state, any state regulations creating different limitations cannot stand. HOS IFR, 72 Fed. Reg. at 71249.

With respect to preemption determinations, no state may have in effect or enforce a state law or regulation that the FMCSA determines to be incompatible with the FMCSRs. 49 C.F.R. § 355.25(a). Once confronted with an unenforceable state rule, the FMCSA is required to initiate a rule making under 49 C.F.R. Part 389. Id. at § 355.25(c).

B. Procedure

1. Governing Regulations

Petitions are governed by 49 C.F.R. § 389.31 and this Petition complies with the requirements of that section. Once a petition is received, unless the Administrator specifies otherwise, there is no public hearing, argument, or other proceeding on the petition before it is either granted or denied. 49 C.F.R. § 389.33(a). “The Administrator initiates rule making on his own motion.” Id. at § 389.13. If the Administrator determines that the petition contains adequate justification, then rule making is initiated. Id. at § 389.33(b). Except in those instances where the Administrator requests recommendations of interested persons, it is only after rule making is initiated that interested persons are entitled to participate, or that the Administrator otherwise invites interested persons to participate in the rule making. Id. at § 389.17(a), (b).

Only *after* making a decision that a state law or regulation *may not be enforced* is the FMCSA required to provide notice to the state of its decision. 49 U.S.C. § 31141(e).

If, on the other hand, the Administrator determines that the petition does not justify rule making, he may deny the petition. 49 C.F.R. § 389.33(c). Regardless of whether the petition is denied or granted, the Office of Chief Counsel of the FMCSA “prepares a notice of that grant or denial for issuance to the petitioner, and the Administrator issues it to the petitioner.” 49 C.F.R. § 389.33(d). It is only in those situations when the petition is granted, and either a notice of proposed rule making or a final rule are to be issued, that publication in the Federal Register is appropriate. *Id.* at § 389.15(a), 389.29. Where the petition is denied, the only communication is the notice of the denial to petitioner issued pursuant to 49 C.F.R. § 389.33.

2.

Propriety of Requested Relief

Here, Petitioners are requesting that the Administrator issue a final rule without requesting comments as continued enforcement of the Meal and Rest Break Rules is not only incompatible with the HOS Regulations, but also may pose a threat to safety. The Administrator is authorized to take such action if he, “for good cause, finds a notice is impractical, unnecessary, or contrary to the public interest, and incorporates such a finding and a brief statement of reasons for it in the rule.”⁸ *Id.* at § 389.11. Petitioners contend that their request is exactly the type of request which is appropriate for issuance of a final rule without notice and comment rule making.

Petitioners are not requesting that the FMCSA issue a new regulation, amend a regulation, or repeal a regulation. Instead, Petitioners are requesting that the FMCSA consider whether enforcement of a state rule is prohibited under 49 U.S.C. § 31141 because it is more stringent than an *existing regulation* (the HOS Regulations). The FMCSA is vested with the sole authority, as the designee of the Secretary of the DOT, to make this decision. 49 U.S.C. § 31141(a).

The United States Court of Appeals for the D.C. Circuit has upheld a rule promulgated by the FMCSA’s predecessor, the FHWA, without notice and comment rule making where, as here, the agency was interpreting whether an external rule was consistent with its own regulations. International Brotherhood of Teamsters v. Pena, 17 F.3d 1478 (D.C. Cir. 1994). As part of the appeal, the court addressed the Teamsters’ argument that the FHWA was still required, by the regulations at 49 C.F.R. Part 389, to engage in notice and comment rule making. The court gave this argument the short shrift it deserved. According to the court, the FHWA had properly invoked the “impractical, unnecessary, or contrary to the public interest” exception to notice and comment rule making. *Id.* The requirement that the Administrator incorporate a brief statement of the good cause for finding that notice is unnecessary was met by the Administrator’s statement that “it is not anticipated that [notice and comment] would result in the receipt of

⁸ A similar exception to notice and comment rule making exists under the Administrative Procedure Act (“APA”) where the agency finds that notice and public procedure are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B).

useful information.” *Id.* The court explained that the mere fact that comments might reveal “widespread objections” did not mean that issuance of a final rule without comment was inappropriate. *Id.*

Here, if the Meal and Rest Break Rules cannot be enforced under the standards set forth in 49 U.S.C. § 31141, then it does not matter whether comments would reveal “widespread objections.” Comments are even more unavailing here because, unlike in *Pena*, the FMCSA has taken no action. The HOS Regulations, for purposes of this Petition, are settled and no part of them is being challenged. Comments as to the appropriateness of the HOS Regulations are not appropriate in this forum. The only matter at issue here is whether, *as a matter of law*, the Meal and Rest Break Rules are preempted from being enforced against drivers subject to the HOS Regulations under 49 U.S.C. § 31141, a statute that the FMCSA is tasked with interpreting. Any balancing of interests with respect to the HOS Regulations occurred in the underlying notices and rule makings. Now that those interests have been balanced, if the Meal and Rest Break Rules run afoul of the HOS Regulations under the standards set forth in 49 U.S.C. § 31141, then they cannot be enforced. Moreover, to the extent that the Meal and Rest Break Rules may result in decreased safety, or require motor carriers and their drivers to comply with two competing sets of regulation, immediate action is appropriate.

If, against the request of the Petitioners, the Administrator finds that notice is necessary, Petitioners take the position that it should at least be appropriate for the FMCSA to issue a preliminary determination of preemption since the regulations allow the agency to issue a notice containing the substance and terms of the proposed rule. *Id.* at § 389.15(b)(3). As is discussed in more detail below, preliminary determination has been issued in the past under 49 U.S.C. § 31141.

C.

Interplay of State and Federal Regulation

The predecessor statute to 49 U.S.C. § 31141 was added to the U.S. Code by the Motor Carrier Safety Act of 1984. Pub. L. 98-554 § 208. That act clearly established Congress’s “plan to establish the preeminence of federal regulation in the area of CMV safety.” Motor Carrier Safety Assistance Program (“MCSAP”), 57 Fed. Reg. 13572 (April 16, 1992). The 1984 Act gave the DOT the power to preempt state regulation of CMV safety, but it did not address how the DOT could either require or persuade states to adopt and enforce the FMCSRs, meaning that it was up to the federal government to police state laws and regulations affecting CMV safety. That ability is found in the MCSAP as discussed in the following statement of the FMCSA’s predecessor, the FHWA:

The 1984 Act authorized the Secretary [of Transportation] to preempt State laws and regulations affecting commercial motor vehicle safety which were found to be inconsistent with Federal laws and regulations. Such finding would have the effect of rendering the inconsistent provisions unenforceable, but the law was silent as to the means by which States could be compelled or induced to enforce the Federal safety rules or such State rules as were determined to be compatible. The MCSAP is the obvious means by which this void can be filled.

Id. at 13573. The MCSAP was established by the Surface Transportation Assistance Act of 1982. Pub. L. 97-424. It grants the DOT authority to make grants to states for “the development or implementation of programs for improving motor carrier safety and the enforcement of regulations, standards, and orders of the United States Government on commercial motor vehicle safety . . . and compatible state regulations.”⁹ 49 U.S.C. § 31102. The FMCSA also has authority under the MCSAP to withhold MCSAP funds from states in certain situations, including when a state is enforcing an incompatible law or regulation. 49 C.F.R. § 350.335(d) (granting the FMCSA authority to initiate proceedings to withdraw MCSAP funding if a state law or regulation in either interstate or intrastate commerce is incompatible with the FMCSRs). “The MCSAP also . . . promotes the adoption and uniform enforcement of safety rules, regulations, and standards compatible with the [FMCSRs] . . . for both interstate and intrastate motor carriers and drivers.”¹⁰ 49 C.F.R. § 350.101.

An understanding of the interplay of the MCSAP and 49 U.S.C. § 31141 is vital to understanding the DOT’s authority with respect to state regulation of CMV safety. The analysis under each authority is based, in part, upon an analysis of whether state laws are incompatible with the FMCSRs. 49 U.S.C. § 31141(c)(4)(B); 49 C.F.R. § 350.335(d) (granting the FMCSA authority to initiate proceedings to withdraw MCSAP funding if a state law or regulation in either interstate or intrastate commerce is incompatible with the FMCSRs).

Under the MCSAP, the FMCSA’s authority over state laws (whether affecting interstate or intrastate commerce) is tied to funding. Preemption authority under 49 U.S.C. § 31141, however, is not tied to MCSAP funding.

The FHWA views preemption and funding decisions as mechanisms to achieve compatibility. A finding of incompatibility through the preemption process may

⁹ If the state law applies only to intrastate commerce, it may differ from the FMCSRs to the extent it is still within certain tolerance guidelines established by the FMCSA. See 49 C.F.R. §§ 350.105, 350.339. A discussion of the basis underlying the different treatment afforded state rules affecting intrastate commerce versus those affecting interstate commerce can be found at 57 Fed. Reg. at 13580.

¹⁰ We leave to the FMCSA’s discretion whether to take action with respect to California’s MCSAP funding, but would certainly request that it do so if California fails to otherwise address Petitioners’ concerns. Petitioners’ counsel submitted a request to the FMCSA on February 26, 2008 (which was later supplemented on May 13, 2008), under the Freedom of Information Act (“FOIA”) in order to determine whether California has submitted the Meal and Rest Break Rules for review by the FMCSA (or its predecessors) as required by the MCSAP. Although Petitioners have not yet received a response from the FMCSA, Petitioners anticipate that the FMCSA will find that California has not submitted the Meal and Rest Break Rules for review because it did not believe it was creating a state law or regulation affecting CMV safety. Given the immediacy of this issue to Petitioners in particular and to the motor carrier industry as a whole, Petitioners have decided it is imperative that they act immediately notwithstanding the pending FOIA request. Even assuming that California has submitted the Meal and Rest Break Rules for review, nothing in the law prohibits Petitioners from seeking a preemption determination as interested parties or prohibits the FMCSA from finding the Meal and Rest Break Rules incompatible with the HOS Regulations and therefore preempted.

result in a decision to deny the State funding under the MCSAP. *Preemption and funding may also be independent actions*, depending on the nature of the compatibility finding.

Compatibility of State Safety Requirements Affecting Interstate Commercial Motor Vehicles, 56 Fed. Reg. 7319, 7321 (Feb. 22, 1991) (emphasis added). Preemption is an appropriate remedy where, as here, the state regulation at issue is more stringent than the federal regulation. “Realistically, it is more stringent regulations by States affecting interstate commerce that would most likely be the subject of preemption determinations.” Motor Carrier Safety Assistance Program, 57 Fed. Reg. at 13580-81.

Action on petitions filed under 49 C.F.R. Part 355 is admittedly rare. In fact, Petitioners have located only one proceeding in which a rule making was initiated to declare a state law or regulation preempted under 49 U.S.C. § 31141. The FHWA initiated that action after it determined that certain provisions of Mississippi’s motor carrier safety regulations were inconsistent with the FMCSRs.¹¹ See State Commercial Motor Vehicle Safety Law Affecting Interstate Commerce, 60 Fed. Reg. 47421 (September 12, 1995). The fact that action is rare, however, does not have any bearing on Petitioners’ request that the FMCSA initiate a rule making to declare the Meal and Rest Break Rules preempted to the extent applied to drivers subject to the HOS Regulations. When considered in context, petitions *should be* rare because the FMCSA has authority to preempt state rules and regulations that are incompatible with the FMCSRs and the MCSAP provides states with a fiscal incentive to police themselves to ensure that they are maintaining compatible regulations. Pursuant to that incentive, the states have, for the most part, acted to adopt compatible regulations.

The U.S. Supreme Court recently reaffirmed the FMCSA’s continuing authority to review state laws under 49 U.S.C. § 31141. Referring to that statute, the Court stated, “That provision authorizes the Secretary to void any ‘State law or regulation on commercial motor vehicle safety’ that, in the secretary’s judgment” is incompatible with a regulation prescribed by the Secretary. City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424, 441 (2002).

D.

California Acknowledgment of Federal Authority

California’s legislature expressly requires that California’s hours of service regulations be “consistent” with the HOS Regulations. Cal. Vehicle Code 34501.2(a). In fact, the analysis accompanying a bill adopted by California in 2006 expressly acknowledges concern over the fact

¹¹ The Mississippi-related proceeding also stands for the proposition that the FMCSA has authority to issue a preliminary determination that a state law is preempted. In the Notice announcing the FHWA’s review of the Mississippi rule, the FHWA issued a preliminary determination that the state requirement was preempted. State Commercial Motor Vehicle Safety Law Affecting Interstate Commerce; Notice of Review and Preliminary Preemption Determination, 59 Fed. Reg. 36252 (July 15, 1994). The preliminary preemption determination was followed by the final notice of preemption a year later. State Commercial Motor Vehicle Safety Law, 60 Fed. Reg. 47421 (September 12, 1995). Here, as stated, Petitioners are requesting that the FMCSA forego notice and comment and exercise its authority under 49 C.F.R. § 389.11, to issue a final rule.

that California had yet to conform to regulations adopted by the FMCSA as required under the MCSAP. Assembly Bill Analysis of A.B. 3011, 2006 Assem. (Cal. 2006) available at: http://info.sen.ca.gov/pub/05-06/bill/asm/ab_3001-3050/ab_3011_cfa_20060810_191132_sen_floor.html (last checked July 3, 2008). Specifically, the analysis acknowledged the potential adverse effect the failure to conform could have on the funding of the Department of California Highway Patrol (“CHP”). “If California fails to comply, this could potentially result in the loss of MCSAP funds, which directly support the [CHP’s] commercial vehicle enforcement program.” *Id.*

With respect to intrastate hours of service regulations, the CHP, and not the IWC, is the California agency that is tasked with regulating driver hours of service. Thus, according to the California legislature, “it is the legislative intention . . . that the rules and regulations adopted by the [CHP] . . . shall apply uniformly throughout the State of California, and no state agency . . . shall adopt or enforce any ordinance or regulation which is inconsistent with the rules and regulations adopted by the [CHP]” with respect to CMV safety. Cal. Veh. Code § 34503.¹²

Like the California legislature, the CHP has expressly acknowledged the predominance of federal regulation in the area of interstate driver hours of service.¹³ In revising its own hours

¹² Another provision of the California Vehicle Code states as follows:

Nothing in this division or the regulations adopted under this division is intended to, or shall, affect the regulations adopted pursuant to other provisions of law concerning the rate or rates of payment of wages by any other public agency, including, but not limited to, the Industrial Welfare Commission or the Division of Labor Standards Enforcement of the Department of Industrial Relations.

Cal. Vehicle Code 34501.9(b). This provision does not affect the preemption analysis because, as discussed below, Petitioners are not challenging provisions of California law relating to payment of wages.

¹³ The CHP has not always been so quick to agree with the scope of FMCSA’s authority over California safety regulations. During an FHWA rule making involving the MCSAP, the CHP submitted comments addressing, among other things, a proposal to change the definition of “compatible or compatibility” in 49 C.F.R. § 350.105. In its comments, California argued that states participating in the MCSAP “should be given latitude to enact regulations and statutes that are compatible with federal regulations, but not identical.” Motor Carrier Safety Assistance Program, Docket No. FHWA-1998-4878-0030 at 1 (later revised to Docket No. FMCSA-1998-3848) available at www.regulations.gov (last checked July 3, 2008) (“CHP MCSAP Comments”). In the same comments, the CHP went on to argue that states should be allowed to adopt variances from the FMCSR for vehicles operating in both interstate and intrastate commerce. *Id.* at 5. The FMCSA specifically responded to and rejected this approach:

California’s request would undermine the congressional intent and purpose of the MCSAP to ensure uniformity of regulations and enforcement among the States. Since the inception of the program, the [FMCSA] has required each State to enforce uniform motor carrier safety and hazardous materials regulations for both interstate and intrastate motor carriers and drivers. Safety standards in one State must be compatible with the requirement in another State in order to foster a uniform national safety environment.

The purpose of variances is to set forth the limits within which a state can deviate from

Continued

of service rules in 2007, the CHP issued a “Modified Statement of Reasons” dated March 2007 (“Statement of Reasons” available at <http://www.chp.ca.gov/regulations/pdf/O6-04msr.pdf> (last checked July 3, 2008)). In stating the purpose of the regulatory action, the CHP stated that, by “adopting essentially identical regulations, this rule making will enhance the competitiveness of California by eliminating or modifying, to the extent possible, regulations that represent a negative impact on businesses by conflicting with updated federal regulations.” Statement of Reasons, at 1. The CHP cited its obligation of adopting rules “consistent” with the HOS Regulations and concluded its action would “eliminate the possibility of California businesses being required to follow state rules which reflect out-of-date federal regulations for their intrastate operations, only to switch to current federal regulations when operating in interstate commerce.” Id. at 6-7. The CHP noted that the only alternative to the revision was to make no change, which “would result in federal preemption of California’s Driver Hours of Service Regulations” and would “jeopardize federal [MCSAP] grants.” Id. at 15. The CHP did not refer to the Meal and Rest Break Rules in revising California’s intrastate hours of service regulations.

Based on the foregoing, it appears that the CHP and the California legislature intend for California’s own regulations governing hours of service of intrastate CMV drivers to be consistent with the HOS Regulations governing interstate drivers. Given this intent, the Meal and Rest Break Rules should not create an inconsistency between California law and the federal HOS Regulations, but they in fact have. Even if this inconsistency is inadvertent, there is in fact a conflict between the standards that must be addressed. For this reason, Petitioners submit that immediate action from the FMCSA declaring the Meal and Rest Break Rules preempted as applied to drivers subject to the HOS Regulations is necessary.

V.

PROVISIONS FOR WHICH PREEMPTION IS REQUESTED

The Meal and Rest Break Rules are not specific to drivers of CMVs. Thus, Petitioners are not seeking a universal declaration that the FMCSA declare the Meal and Rest Break Rules preempted. On the other hand, the Meal and Rest Break Rules *are* contained in an IWC Transportation Wage Order No. 9, which is specific to transportation industry workers and are being applied to drivers of CMVs in interstate commerce. These individuals are subject to the HOS Regulations, and imposition of more stringent regulations on them is subject to review under 49 U.S.C. § 31141 and 49 C.F.R. Part 355. Because the Meal and Rest Break Rules do not pass muster under these legal standards. Petitioners are specifically requesting that the FMCSA preliminarily declare Cal. Labor Code § 512(a); Cal. Code Regs. tit. 8, § 11090(11)(A), (11)(B),

the FMCSRs and still be considered compatible for funding purposes under 49 C.F.R. 350. But these variances are applicable only to those State rules and regulations where the U.S. Department of Transportation does not have jurisdiction, namely intrastate commerce. Variances are not available for State rules and regulations governing interstate commerce.

Motor Carrier Safety Assistance Program, 65 Fed. Reg. 15092, 15098 (March 21, 2000) (emphasis added).

(12)(A), (12)(B); and IWC Transportation Wage Order No. 9, § 11(A), 11(B), 12(A), 12(B) preempted only as applied to drivers of CMVs who are subject to the HOS Regulations.

VI. **PREEMPTION ANALYSIS**

The Meal and Rest Break Rules prohibit drivers from operating at times when they would otherwise be entitled to operate under the HOS Regulations, limit the possibility that a driver will be able to take advantage of the full complement of 11 driving hours within the first 14 hours of coming on-duty, and do not provide the flexibility available to drivers and motor carriers under the HOS Regulations. Thus, the Meal and Rest Break Rules are more stringent than the HOS Regulations. As such, the Meal and Rest Break Rules are preempted if: (1) they are “on commercial motor vehicle safety” for purposes of the statute (49 U.S.C. § 31141(a), (c)); (2) they are additional to or more stringent than the federal HOS Regulations (49 U.S.C. § 31141(c)(4)); and (3) either (a) they are not identical to and do not have the same effect as the HOS Regulations (49 U.S.C. § 31141(c)(4)(B); 49 C.F.R. § 355.5) or (b) enforcement would cause an unreasonable burden on interstate commerce (49 U.S.C. § 31141 (c)(4)(C)).

A. **“On Commercial Motor Vehicle Safety”**

1. **The Scope of 49 U.S.C. § 31141**

The threshold for review under 49 U.S.C. § 31141 is that the state law or regulation be “on commercial motor vehicle safety.” That statute does not define the phrase “on commercial motor vehicle safety,” but other federal statutes clarify its meaning and the Meal and Rest Break Rules fall within the scope of the phrase. Specifically, Congress has granted the DOT authority to “prescribe regulations *on commercial motor vehicle safety*.” 49 U.S.C. § 31136 (emphasis added). Reading these statutes together, then, the phrase “on commercial motor vehicle safety” in 49 U.S.C. § 31141 encompasses the entire grant of authority to the DOT under 49 U.S.C. § 31136. Importantly, the HOS Regulations are promulgated, at least in part, under this authority. Hours of Service of Drivers, 70 Fed. Reg. 49978, 49979 (August 25, 2005). Thus, the only logical/consistent interpretation of “on commercial motor vehicle safety” under 49 U.S.C. § 31141 is to interpret it as applying to state laws or regulations that regulate or affect subject matter within the FMCSA’s authority under 49 U.S.C. § 31136, i.e., any state law or regulation that regulates subject matter within the FMCSA’s authority under 49 U.S.C. § 31136 is “on commercial motor vehicle safety” for purposes of 49 U.S.C. § 31141.

Conceivably, it could be argued that the Meal and Rest Break Rules are not “on commercial motor vehicle safety” because they are rules of general applicability and their application is not limited to CMVs. When considered from a practical perspective, however, there can be no question that the Meal and Rest Break Rules are exactly the type of rules that fall within the scope of 49 U.S.C. § 31141. As a practical matter, interpreting the statute to apply only to state laws or rules applicable solely to CMVs would open the door to state regulation of CMV safety under the guise of generally applicable state laws or rules. As discussed below,

such a patchwork system of regulation would allow states to circumvent the FMCSA's regulations, a result that cannot be countenanced in light of the careful balancing in which the FMCSA engages when regulating operation of CMVs.

Even if the Meal and Rest Break Rules are of general applicability, reading the statute as applying to state laws or regulations that regulate or affect subject matter within the FMCSA's authority will not create a situation where the FMCSA has *carte blanche* authority to begin preempting state laws. For instance, it cannot seriously be contended that reading the statute in this manner would grant the FMCSA authority to review state laws or rules governing, for instance, payment of wages and overtime to employees or reimbursement of employment expenses.¹⁴ For purposes of preemption under 49 U.S.C. § 31141, the FMCSA has power to preempt any state law or regulation that regulates or affects any matters within the agency's broad Congressional grant of authority. The Meal and Rest Break Rules fall within the scope of this grant.

2.

The Meal and Rest Break Rules Regulate the same Subject Matter as the HOS Regulations

That the HOS Regulations are regulations “on commercial motor vehicle safety” cannot be disputed. Nor can there be any dispute that the HOS Regulations are not merely intended to ensure that drivers of CMVs obtain sufficient rest for their own health and well-being, but that a primary goal of the HOS Regulations to provide for the safety of the motoring public, while at the same time balancing the practical necessity of ensuring an orderly flow of goods throughout the country. Revisions to the HOS Regulations have been undertaken pursuant to Congress' express mandate that the FMCSA (and its predecessor the FHWA) address fatigue-related issues. See Hours of Service of Drivers, 68 Fed. Reg. at 22457 (citing Pub. L. 104-88 § 408); see also, id. (quoting 49 U.S.C. § 113(b) for the proposition that “[i]n carrying out its duties, the [FMCSA] shall consider the assignment and maintenance of safety as the highest priority”). In revising the HOS Regulations, the FMCSA has expressly considered *daily work/rest cycles*, industry segments, *daily off-duty time*, *distinctions in duty time*, weekly work cycles, weekly recovery periods, *short rest breaks during a work shift*, economic impacts, proposed costs, proposed benefits, safety impacts, safety benefits, changes in crash damages, changes in fatigue-

¹⁴ Petitioners are not suggesting that all state regulation of meal and rest breaks of employees subject to the HOS Regulations is prohibited. According to Petitioners' research, more than 25 states have adopted some form of meal and rest break rules and, at least as the rules are drafted, it appears that most would pass muster under the HOS Regulations. California's Meal and Rest Break Rules are problematic, however, in that they require that the break be taken within a specific timeframe *and* prohibit the employer from simply paying the employee to work through a break and then taking a break at an acceptable time. The cumulative effect is that under the Meal and Rest Break Rules the employer is required to provide meal and rest breaks at specified times and has no option of simply paying the employee to work during the break to which he or she is entitled. Moreover, the driver is not provided with the flexibility to take breaks when he or she deems necessary. This is an important safety aspect of the HOS Regulations that the FMCSA carefully considered.

related fatalities, cost of alternatives, and net benefits. *Id.* at Table of Contents (emphasis added).

While not specific to drivers who are subject to the HOS Regulations, when applied to such drivers, the Meal and Rest Break Rules regulate and affect the same subject matter as the HOS Regulations. In 2003 the FMCSA actually proposed adoption of a requirement that would have imposed mandatory breaks on drivers similar to the Meal and Rest Break Rules, but then expressly *rejected* it. *Id.* at 22479. This proposal, which would have *required* that drivers take at least two hours worth of off-duty breaks during the workday, will be discussed in more detail below. For present purposes, it is enough to note that the FMCSA, pursuant to its obligation to regulate interstate driver hours of service, considered imposing a requirement that would have imposed the same requirements that California law has imposed via the Meal and Rest Break Rules. Thus, there can be no question that, to the extent applied to drivers subject to the HOS Regulations, the Meal and Rest Break Rules are a regulation “on commercial motor vehicle safety” as that phrase should be understood in the context of 49 U.S.C. § 31141 *because they regulate the same conduct as the HOS Regulations* when they are applied to drivers subject to the HOS regulations as illustrated by the fact that the FMCSA expressly considered adopting a similar requirement.

3.

Applicability to Drivers

The second basis for a finding that the Meal and Rest Break Rules are on CMV safety is that they apply to drivers of CMVs. If the Meal and Rest Break Rules exempted drivers of CMVs from their purview, or drivers in interstate commerce, then Petitioners would not be seeking a preemption determination. But there is no general exemption for drivers of CMVs who are subject to the HOS Regulations. *See e.g., Cicairos*, 133 Cal.App. 4th 949 (holding employer liable for failing to ensure that drivers took meal breaks); *IWC Transportation Wage Order No. 9*, § 3(L) (exempting employees whose hours of service are subject to the HOS Regulations from the overtime provisions of the order, but not the meal and rest break provisions); *id.* § 11(F), 12(C) (exempting public transit bus drivers covered by valid collective bargaining agreements from the Meal and Rest Break Rules if the agreement meets certain standards). The Meal and Rest Break Rules are applied to and being enforced against interstate drivers who are subject to the HOS Regulations.

4.

The Meal and Rest Break Rules Regulate Conduct

Petitioners are seeking preemption only on rules regulating when a driver may and may not drive, not preemption of any rule requiring payment of wages to employees. The FMCSA has been clear that the FMCSRs do not address payment of wages, and Petitioners are not requesting that the FMCSA preempt, or even address, any matters related to payment of wages. *See* 49 C.F.R. § 395.2, Interpretation Guidance to Question 2 (published at 62 Fed. Reg. 16370, 16422). Petitioners have therefore not requested that the FMCSA preempt California Labor Code § 226.7 or the corresponding provisions of the IWC Transportation Wage Order No. 9 that require payments to employees that are not provided meal and rest breaks.

By requiring employers to provide drivers with meal and rest breaks within certain timeframes, the Meal and Rest Break Rules prohibit drivers from performing any work during times they could otherwise be driving or performing other on-duty non-driving tasks. A motor carrier (or any other employer subject to the Meal and Rest Break Rules) cannot simply pay drivers to work through breaks, since doing so would still constitute a violation for which the employer would be liable for payment of an additional hour of wages. Thus, the Meal and Rest Break Rules are not simply a wage payment regulation because they prohibit working at regulated intervals, and they cannot be avoided by simply paying an employee to work during such intervals. If California could avoid preemption simply due to the fact that the remedy for violating the Meal and Rest Break Rules is the payment of wages to the employee, then any state could regulate hours of service by imposing incompatible regulations and holding a non-compliant employer liable for a wage payment.

Under the Meal and Rest Break Rules, an on-duty meal break is permitted only when the employee is performing the type of work “that prevents the employee from being relieved of all duty.” IWC Transportation Wage Order No. 9, § 11(C). A driver is clearly not prevented from being relieved of all duty. The FMCSA has specifically stated that a driver can record meal stops as off-duty time for purposes of the HOS Regulations if the driver was relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo. 49 C.F.R. § 395.2- Interpretation Guidance to Question 2 (published at 62 Fed. Reg. 16370, 16422). Similarly, the HOS Regulations specifically allow for a driver to record off-duty time in his/her log books. 49 C.F.R. §§ 395.8(a)(2), (b)(2), 395.3(a). Because a driver can be relieved of all duty for meals under the HOS Regulations, a driver does not qualify to take an on-duty meal period under Meal and Rest Break Rules.

Even if a motor carrier could permit or require its drivers to take on-duty meal breaks and therefore avoid the prohibitions otherwise imposed by the Meal Break Rules, preemption would still be appropriate. The rules require the motor carrier to obtain the written agreement of the employee, and the employee is allowed to rescind the written agreement at any time. IWC Transportation Wage Order No. 9, § 11(C). The Meal Break Rules cannot avoid preemption based on a motor carrier’s “right” to require the employee to take an on-duty meal break. By allowing the employee to refuse to do so it is tantamount to imposing a meal break requirement on the motor carrier.

B. **More Stringent**

The HOS Regulations set forth *maximum* hours of service of motor carrier drivers. 49 U.S.C. § 31502. Thus, any external, government-imposed requirement that limits driver hours of service to a lesser amount than allowed under the HOS Regulations is by definition more stringent. The Meal and Rest Break Rules are more stringent than the HOS Regulations because they require that a driver cease driving at specific times during the maximum 14-hour workday that he or she would otherwise be allowed under the HOS Regulations. Not only does this interfere with the driver’s individual work schedule, it also inflicts a loss of scheduling flexibility since the driver cannot make a delivery during a mandated meal or rest break. The FMCSA

specifically cited the interest in avoiding “loss of scheduling flexibility” as grounds for passing its interim final rule. HOS IFR, 72 Fed. Reg. at 71249.

The Meal and Rest Break Rules impose two additional requirements on drivers and motor carriers not imposed by the HOS Regulations. First, they require that the driver incur off-duty time during the maximum 14-hour period during which the driver can work. Except for time spent resting in a sleeper berth, which is subject to its own marking rules, a driver is required to mark time as off-duty when “the driver is not on duty, is not required to be in readiness for work, or is not under any responsibility for performing work.” 49 C.F.R. § 395.8(h)(1). Thus, if the driver was forced to take a meal or rest break, the break would have to be marked as off-duty time in the required logbook because, as already discussed, an on-duty meal or rest break is not allowed by the Meal and Rest Break Rules. Under the current HOS Regulations, however, the 14-hour time period during which the driver is allowed to drive is not extended by taking intermittent off-duty breaks during the 14-hour work day. 49 C.F.R. § 395.3(a)(2). The driver is prohibited from driving after 14 hours of initially coming on duty unless the driver has 10 consecutive hours of off-duty time (or eight consecutive off-duty hours in the sleeper berth and two additional on-duty hours), and intermittent off-duty breaks required by the Meal and Rest Break Rules do not change this result. Id.

Second, they mandate when such breaks must be taken. Within the HOS Regulations, drivers are granted broad discretion to take breaks as business and circumstances require. “Drivers are free under the [HOS Regulations] to take rest breaks at any time.” Hours of Service of Drivers, 68 Fed. Reg. at 22466. Speaking of its rejection of mandatory rest breaks, the FMCSA stated that such breaks “would significantly interfere with the operational flexibility motor carriers and drivers need to manage their schedules.” Hours of Service of Drivers, 70 Fed. Reg. at 50011. Importantly, the proposed rule did not even go as far as to regulate when breaks had to be taken, but the FMCSA still determined the proposal was too much of a burden on flexibility. By imposing mandatory breaks at specific times, the Meal and Rest Break Rules are more stringent than the HOS Regulations.

C.

Enforceability

As a more stringent regulation, the Meal and Rest Break Rules cannot be enforced: (1) if they are incompatible with the HOS Regulations; *or* (2) if they constitute an unreasonable burden on interstate commerce.

1.

Incompatibility

For purposes of this analysis, a compatible state law or regulation is one that is either identical to, or has the same effect as the HOS Regulations. See 49 C.F.R. § 355.5. Incompatible state laws or regulations, then, are those that are not identical to or do not have the same effect as the HOS Regulations. Under this standard, the Meal and Rest Break Rules are incompatible with the HOS Regulations for the same reasons that they are more stringent than the HOS Regulations because they limit a driver’s ability to drive or conduct on-duty not driving

tasks during time when such activities are allowed by the HOS Regulations. The Meal and Rest Break Rules are also incompatible for the reasons set forth below.

Perhaps the most compelling illustration that the Meal and Rest Break Rules are incompatible with the HOS Regulations is the fact that the FMCSA proposed adding a section to the HOS Regulations that would have had a very similar effect to the Meal and Rest Break Rules, but ultimately decided against doing so. The proposed rule considered in 2000 would have required motor carriers to provide time for certain types of drivers to “take at least two off-duty hours each workday to rest and nap at the driver’s discretion.” Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25540, 25587 (May 2, 2000). Unlike the Meal and Rest Break Rules, however, this proposed rule would not have governed *when* such breaks must be taken.

Even though the proposed rule was less strict than the Meal and Rest Break Rules, the FMCSA still rejected the proposal in adopting its final rule in 2003. Instead, the FMCSA adopted the current rule with respect to driving 11 hours during the first 14 hours of coming on duty. The FMCSA explained the move away from mandated off-duty breaks as follows:

The principal reason, however, for reserving two hours out of the 14-hour block for rest periods was to ensure that road drivers, who spend most of their time in driving mode, were afforded the opportunity to improve safety by alleviating potential drowsiness *through strategic use of break time*. The FMCSA assumed that drivers would rarely, if ever, spend an entire 14-hour period behind the wheel. There are simply too many naturally occurring personal and occupational demands that would require the driver’s presence elsewhere. The FMCSA stated, therefore, that regulating such personal time away from driving would not be a burden on productivity and would empower drivers to insist upon necessary break time.

Hours of Service of Drivers, 68 Fed. Reg. at 22479 (emphasis added). However, the FMCSA rejected the rule stating “with a limitation of 11 hours on daily driving [as opposed to the 12 hours under the proposed rule], the FMCSA believes the need for additional break time diminishes.” *Id.* Moreover, the FMCSA realized that “the difficulty in enforcing required breaks reduces the likelihood of realizing benefits intended.” *Id.* Here, the Meal and Rest Break rules impose just such a “difficult” burden. The FMCSA rejected the proposed rule as an unnecessary impingement on driver work time and adopted a final rule that was more lenient. Certainly then, a rule that is more stringent than the rejected rule cannot be said to “have the same effect” as the current HOS Regulations.

There is also evidence that imposition of the Meal and Rest Break Rules on drivers of CMVs decreases highway safety. While it may be contended that the Meal and Rest Break Rules were passed for the welfare of all employees working in California, including interstate drivers who are subject to the HOS Regulations, Petitioners have located no evidence that the California legislature, the IWC, or the CHP conducted any scientific analysis as to the effect of imposing the Meal and Rest Break Rules on drivers of CMVs. The FMCSA did perform such

analysis after proposing the rule that would have required drivers to take meal and rest breaks. In discussing its decision to do away with the proposed requirement, the FMCSA noted that Advocates for Highway and Auto Safety did not support the proposal. A specific concern was the contributing effect of “post-nap sleep inertia” to highway accidents. *Id.* at 22480.

General statements that the Meal and Rest Break Rules protect health and safety do not address whether the Meal and Rest Break Rules increase CMV safety. Such arguments are not supported by any specific scientific findings, and they do not take into consideration what effect imposition of the Meal and Rest Break Rules on drivers of CMVs will have on the public at large. The FMCSA does not even allow state regulations of intrastate driver hours of service to vary from the interstate rules unless the variance is supported by science. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25540, 25583 (May 2, 2000). Thus, by no means should a state law affecting drivers in interstate commerce be allowed to alter the effect of the HOS Regulations if not supported by scientific findings.

Furthermore, even if application of the Meal and Rest Break Rules to interstate drivers resulted in increased safety, the result would be the same. Petitioners are certainly in favor of ensuring and increasing highway safety, but the FMCSA, in promulgating the HOS Regulations, must consider more than just safety, otherwise, it would simply prohibit the operation of CMVs. Instead, the FMCSA must strike a balance between safety and the necessity for CMVs to operate effectively. See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. 22456 at 22461 (April 28, 2003) (stating that the final rule struck a balance between “uniform, consistent enforcement and the need for operational flexibility”); see also, 49 U.S.C. § 31136(c)(2)(A) (requiring that the FMCSA consider costs and benefits before promulgating regulations). Allowing states to limit hours of service available to drivers under the HOS Regulations by claiming that limitations increase safety (regardless of whether those claims are accurate or supported by science) will result in patchwork regulation that violates the stated goals of both Congress and the FMCSA.

The FMCSA expressly rejected a rule that would have been similar to, but more flexible than, the Meal and Rest Break Rules. The rule was rejected in favor of the current rule which gives the driver the ability, but does not require him/her, to take off duty breaks. There can be no argument then that the Meal and Rest Breaks have the same effect as the HOS Regulations because the FMCSA specifically rejected a rule that would have operated similar to the Meal and Rest Break Rules. Moreover, imposition of the Meal and Rest Break Rules to drivers of CMVs ignores the possibility that drivers will be more likely to cause accidents following meal or rest breaks due to sleep inertia.

2.

Unreasonable Burden on Interstate Commerce

Just as with incompatible rules, the FMCSA also has authority to preempt more stringent rules that create an undue burden on interstate commerce. Typically, an analysis of whether a state law or rule unduly burdens interstate commerce is undertaken by a court pursuant to the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Here, however, Congress has specifically granted the FMCSA authority to determine whether the Meal and Rest Break Rules impose an

undue burden on interstate commerce under 49 U.S.C. § 31141. For many of the same reasons that the Meal and Rest Break Rules are incompatible with the HOS Regulations, they also have the effect of creating an unreasonable burden on interstate commerce to the extent they are applied to drivers subject to the HOS Regulations (and therefore operating in interstate commerce by definition).¹⁵

As has already been noted, the FMCSA has expressly stated its interest in ensuring that drivers are subject to the same limitations on hours of service in each state. Hours of Service of Drivers, 72 Fed. Reg. at 71249. The unreasonable effect of the Meal and Rest Break Rules on interstate commerce is clearly illustrated by simply considering the effect on driver hours of service if each state imposed similar but not identical regulations.

If a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by the national interest in the unhampered operation of interstate commerce.

Guy v. IASCO, 2004 WL 1354300 at *6 (citing California v. Zook, 336 U.S. 725, 728 (1949)). When a legitimate safety purpose for a state law exists, it is necessary to weigh the benefits of the law against the burden on interstate commerce. Thus, in order to analyze preemption under the Commerce Clause, it is necessary to consider the purported benefit to the state. Any claim of safety benefits in this specific context is tenuous at best. As stated previously, when the California legislature enacted the Meal and Rest Break Rules, the purported benefit of the rules may have been the health and welfare of all California workers. Certainly, this is a laudable goal, but it has nothing to do with CMV safety. In fact, there is nothing in California legislative history that the Meal and Rest Break Rules is a CMV safety law or regulation. However, the Meal Rest Break Rules, enacted as a law of general applicability in California to all workers, affects the HOS Regulations.

Moreover, in assessing any purported safety benefit of a state regulation, the courts discount the state's objectives where, as here, Congress has in fact already addressed the specific issue that the California regulation, albeit unintentionally, purports to address, which in this limited context is ensuring that drivers in interstate commerce are guaranteed sufficient meal and rest periods. See Edgar v. MITE Corp., 457 U.S. 624, 644-45 (1982). In fact, any safety concerns that the state may have had are addressed by the HOS Regulations and the application of the Meal and Rest Break Rules to drivers of CMVs actually ignores the FMCSA's stated concerns regarding sleep inertia. See Hours of Service of Drivers, 68 Fed. Reg. at 22480.

¹⁵ Two courts have actually found IWC Transportation Wage Order No. 9 to be an unreasonable burden on interstate commerce in the context of the cases before the court. See Guy v. IASCO, 2004 WL 1354300 (Cal. App. 2004); Fitz-Gerald v. Skywest Airlines, Inc., 2007 WL 2728371 (Cal. App. 2007). However, those cases which involved airlines, did not involve a federal statute such as 49 U.S.C. § 31141 granting a federal agency authority to make a determination as to whether a state law or regulation imposed an unreasonable burden on interstate commerce. Thus, the court made that determination in those case.

Here, the burden of imposing the Meal and Rest Break Rules on interstate drivers is real. The FMCSA has stated:

To remain legal, each driver would need to know the HOS limits in each State where he or she operated; this is simply impractical. Drivers could not be sure how their actions in one State would be treated in a State with a different HOS regime.

HOS IFR, 72 Fed. Reg. at 71249. While made in a different context, the quote is certainly applicable here. The Meal and Rest Break rules impose artificial limits on a driver's allowed 14-hour on-duty time available for driving and performing on-duty, non-driving tasks. This requires drivers to know not only the limits imposed by the HOS Regulations, but also the limits in the Meal and Rest Break Rules.

The Supreme Court's decision in Kassel is instructive where, as here, the purported benefit is illusory. Kassel v. Consolidated Freightways, Corp., 450 U.S. 662 at 670 (1981). In Kassel, the state argued that a state law that barred the use of trucks longer than 60 feet from operating on Iowa's interstates was a reasonable implementation of its police power and that longer or double-trailer trucks were more dangerous than the shorter single-trailer trucks. Id. at 667. When analyzing the state law in Kassel, the Supreme Court balanced the legitimate state concerns with the impact of the state law on interstate commerce. "This weighing by a court requires – and indeed the constitutionality of the state regulation depends on – a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." Id. at 670-71 (internal quotations omitted). "The balance here must be struck in favor of the federal interests. The *total effect* of the law as a safety measure in reducing accidents and casualties is so slight and problematical that it does not outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it." Id. at 668 (emphasis in original).

Thus, the courts look beyond the apparent or stated purpose of a regulation and examine whether the state law achieves its stated purpose. Here, there has been *no* meaningful inquiry by the state of California as to whether the Meal and Rest Break Rules reduce accidents or otherwise promote highway safety, and, even if such an interest was put forth, it would ignore the FMCSA's extensive deliberations on this exact point.

In the absence of congressional action to set uniform standards, some burdens associated with state safety regulations must be tolerated. But where, as here, the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause.

Id. at 671. For the foregoing reasons, the Meal and Rest Break Rules are also preempted as an unreasonable burden on interstate commerce.

VII.

CONCLUSION

As this Petition makes clear, the Meal and Rest Break Rules clearly impose limitations on the hours during which a driver is able to drive a CMV. The hours of service of interstate drivers is within the FMCSA's sole regulatory authority. States cannot be allowed to circumvent the FMCSA's authority and indirectly regulate such hours by imposing rules of general applicability. Such efforts, even if done unintentionally, defeat Congress' stated goal of uniformity. Imposing stringent break schedules on individual drivers also increases the likelihood that a driver will not be in a position to take a break when the driver actually feels one is necessary. Moreover, allowing states to regulate in this manner would create a situation where drivers are subject to different limitations on hours of service in different states, a potentiality that the FMCSA has specifically sought to avoid. HOS IFR, 72 Fed. Reg. at 71249.

The Meal and Rest Break Rules, as applied to interstate drivers subject to the HOS Regulations, address the same matters as the HOS Regulations. They are, therefore, subject to the FMCSA's preemption authority. The Meal and Rest Break Rules are more stringent than the HOS Regulations and do not have the same effect as the HOS Regulations. Therefore, Petitioners request that the FMCSA determine that the Meal and Rest Break Rules are preempted under 49 U.S.C. § 31141, and that it exercise its authority under 49 C.F.R. Part 389 to issue a final rule declaring the Meal and Rest Break Rules are preempted from being applied to drivers subject to the HOS Regulations.

Respectfully submitted,

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EXHIBIT A



Effective: January 1, 2006

West's Annotated California Codes Currentness

Labor Code (Refs & Annos)

Division 2. Employment Regulation and Supervision (Refs & Annos)

▣ Part 2. Working Hours (Refs & Annos)

▣ Chapter 1. General (Refs & Annos)

→ **§ 512. Meal periods**

(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

(c) Subdivision (a) does not apply to an employee in the wholesale baking industry who is subject to an Industrial Welfare Commission wage order and who is covered by a valid collective bargaining agreement that provides for a 35-hour workweek consisting of five seven-hour days, payment of 1 and 1/2 the regular rate of pay for time worked in excess of seven hours per day, and a rest period of not less than 10 minutes every two hours.

(d) If an employee in the motion picture industry or the broadcasting industry, as those industries are defined in Industrial Welfare Commission Wage Orders 11 and 12, is covered by a valid collective bargaining agreement that provides for meal periods and includes a monetary remedy if the employee does not receive a meal period required by the agreement, then the terms, conditions, and remedies of the agreement pertaining to meal periods apply in lieu of the applicable provisions pertaining to meal periods of subdivision (a) of this section, Section 226.7, and Industrial Welfare Commission Wage Orders 11 and 12.

CREDIT(S)

(Added by Stats.1999, c. 134 (A.B.60), § 6. Amended by Stats.2000, c. 492 (S.B.88), § 1, eff. Sept. 19, 2000; Stats.2003, c. 207 (A.B.330), § 1; Stats.2005, c. 414 (A.B.1734), § 1.)

Current with urgency legislation through Ch. 40 of 2008 Reg.Sess. and Ch. 7 of 2007-2008 Third Ex.Sess., and Prop. 99

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END OF DOCUMENT

EXHIBIT B

**C BARCLAYS OFFICIAL CALIFORNIA CODE OF
REGULATIONS**

TITLE 8. INDUSTRIAL RELATIONS

**DIVISION 1. DEPARTMENT OF INDUSTRIAL
RELATIONS**

**CHAPTER 5. INDUSTRIAL WELFARE
COMMISSION**

**GROUP 2. INDUSTRY AND OCCUPATION
ORDERS**

ARTICLE 9. TRANSPORTATION INDUSTRY

This database is current through 6/20/08, Register 2008,
No. 25

§ 11090. Order Regulating Wages, Hours, and Working
Conditions in the Transportation Industry.

1. Applicability of Order This order shall apply to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 of this order shall not apply to persons employed in administrative, executive, or professional capacities. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

(1) Executive Exemption A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other

employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(2) Administrative Exemption A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(i) The performance of office or non-manual work directly related to management policies or general business operations of his employer or

his/her employer's customers; or

(ii) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

(d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(e) Who executes under only general supervision special assignments and tasks; and

(f) Who is primarily engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(3) Professional Exemption A person employed in a professional capacity means any employee who meets all of the following requirements:

(a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b).

(d) Who earns a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515 (c) as 40 hours per week.

(e) Subparagraph (b) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this wage order: 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

(f) Notwithstanding the provisions of this subparagraph, pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subparagraph unless they individually meet the criteria established for exemption as executive or administrative employees.

(g) Subparagraph (f) above shall not apply to the following advanced practice nurses:

(i) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.

(ii) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.

(iii) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.

(iv) Nothing in this subparagraph shall exempt the occupations set forth in clauses (i), (ii), and (iii) from meeting the requirements of subsection 1(A)(3)(a)-(d) above.

(h) Except, as provided in subparagraph (i), an employee in the computer software field who is paid on an hourly basis shall be exempt, if all of the following apply:

(i) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(ii) The employee is primarily engaged in duties that consist of one or more of the following:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

- The documentation, testing, creation, or modification of computer programs

related to the design of software or hardware for computer operating systems.

(iii) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(iv) The employee's hourly rate of pay is not less than forty-one dollars (\$41.00). The Division of Labor Statistics and Research shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.

(i) The exemption provided in subparagraph (h) does not apply to an employee if any of the following apply:

(i) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(ii) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(iii) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(iv) The employee is an engineer,

drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(v) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(vi) The employee is engaged in any of the activities set forth in subparagraph (h) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

(B) Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.

(C) The provisions of this order shall not apply to outside salespersons.

(D) The provisions of this order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(E) Except as provided in Sections 4, 10, 11, 12, and 20 through 22, this order shall not be deemed to cover those employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act, 45 U.S.C. Sections 151 et seq.

(F) The provisions of this Order shall not apply to any individual participating in a national service

program, such as AmeriCorps, carried out using assistance provided under Section 12571 of Title 42 of the United States Code. (See Stats. 2000, ch. 365, amending Labor Code s 1171.)

2. Definitions

(A) An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

(B) "Commission" means the Industrial Welfare Commission of the State of California.

(C) "Division" means the Division of Labor Standards Enforcement of the State of California.

(D) "Employ" means to engage, suffer, or permit to work.

(E) "Employee" means any person employed by an employer.

(F) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(G) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(H) "Minor" means, for the purpose of this order, any person under the age of 18 years.

(I) "Outside salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(J) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(K) "Shift" means designated hours of work by an

employee, with a designated beginning time and quitting time.

(L) "Split shift" means a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of Section 1 of this order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Transportation Industry" means any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection therewith; and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles.

(O) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

(P) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day.

(Q) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work

(A) Daily Overtime-General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any

workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

(B) Alternative Workweek Schedules

(1) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a 40 hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by the agreement up to 12 hours a day or beyond 40 hours per week shall be paid at one and one-half (1 1/2) times the employee's regular rate of pay. All work performed in excess of 12 hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays established by

the alternative workweek agreement shall be paid at double the employee's regular rate of pay. Any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift. Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime. No hours paid at either one and one-half (1 1/2) or double the regular rate of pay shall be included in determining when 40 hours have been worked for the purpose of computing overtime compensation.

(2) If an employer whose employees have adopted an alternative workweek agreement permitted by this order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee's regular rate of pay for all hours worked in excess of 12 hours for the day the employee is required to work the reduced hours.

(3) An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

(4) An employer shall explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision (j) of Section 12940 of the Government Code.

(5) An employer shall make a reasonable effort to find a work schedule not to exceed eight (8) hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this section and who is unable to work the alternative workweek schedule established as the result of that election.

(6) An employer shall be permitted, but not required, to provide a work schedule not to exceed eight (8) hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election.

(7) Arrangements adopted in a secret ballot election held pursuant to this order prior to 1998, or under the rules in effect prior to 1998, and before the performance of the work, shall remain valid after July 1, 2000 provided that the results of the election are reported by the employer to the Division of Labor Statistics and Research by January 1, 2001, in accordance with the requirements of subsection (C) below (Election Procedures). If an employee was voluntarily working an alternative workweek schedule of not more than ten (10) hours a day as of July 1, 1999, that alternative workweek schedule was based on an individual agreement made after January 1, 1998 between the employee and employer, and the employee submitted, and the employer approved, a written request on or before May 30, 2000 to continue the agreement, the employee may continue to work that alternative workweek schedule without payment of an overtime rate of compensation for the hours provided in the agreement. The employee may revoke his/her voluntary authorization to continue such a schedule with 30 days written notice to the employer. New arrangements can only be entered into pursuant to the provisions of this section.

(C) Election Procedures

Election procedures for the adoption and repeal of alternative workweek schedules require the following:

(1) Each proposal for an alternative workweek schedule shall be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a

single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(2) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees' work site. For purposes of this subsection, "affected employees in the work unit" may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(3) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least 14 days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. An employer shall provide that disclosure in a non-English language, as well as in English, if at least five (5) percent of the affected employees primarily speak that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. Failure to comply with this paragraph shall make the election null and void.

(4) Any election to establish or repeal an alternative workweek schedule shall be held at the work site of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section. Upon a complaint by an affected employee, and after an

investigation by the labor commissioner, the labor commissioner may require the employer to select a neutral third party to conduct the election.

(v) Any type of alternative workweek schedule that is authorized by the California Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within 60 days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

(6) Only secret ballots may be cast by affected employees in the work unit at any election held pursuant to this section. The results of any election conducted pursuant to this section shall be reported by the employer to the Division of Labor Statistics and Research within 30 days after the results are final, and the report of election results shall be a public document. The report shall include the final tally of the vote, the size of the unit, and the nature of the business of the employer.

(7) Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least 30 days after the announcement of the final results of the election.

(8) Employers shall not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. No employees shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. However, nothing in this section shall prohibit an employer from

expressing his/her position concerning that alternative workweek to the affected employees. A violation of this paragraph shall be subject to California Labor Code Section 98 et seq.

(D) One and one-half (1 1/2) times a minor's regular rate of pay shall be paid for all work over 40 hours in any workweek except minors 16 or 17 years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsection (A) or (B) and (C) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from \$500 to \$10,000 as well as to criminal penalties. Refer to California Labor Code Sections 1285 to 1312 and 1390 to 1399 for additional restrictions on the employment of minors and for descriptions of criminal and civil penalties for violation of the child labor laws. Employers should ask school districts about any required work permits.)

(E) An employee may be employed on seven (7) workdays in one workweek when the total hours of employment during such workweek do not exceed 30 and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

(H) Except as provided in subsections (E) and (G), this section shall not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of

pay for those employees of not less than 30 percent more than the state minimum wage.

(I) Notwithstanding subsection (H) above, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement pertaining to the hours of work of the employees, the requirement regarding the equivalent of one (1) day's rest in seven (7) (see subsection (G) above) shall apply, unless the agreement expressly provides otherwise.

(J) If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that makeup work time, if performed in the same workweek in which the work time was lost, may not be counted toward computing the total number of hours worked in a day for purposes of the overtime requirements, except for hours in excess of 11 hours of work in one (1) day or 40 hours of work in one (1) workweek. If an employee knows in advance that he/she will be requesting makeup time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make up work time for up to four (4) weeks in advance; provided, however, that the makeup work must be performed in the same week that the work time was lost. An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this subsection. While an employer may inform an employee of this makeup time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make up the work hours within the same workweek pursuant to this subsection.

(K) The daily overtime provision of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for 24-hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one (1) hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule.

(L) The provisions of this section are not applicable

to employees whose hours of service are regulated by:

(1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or;

(2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and the following sections, regulating hours of drivers.

(M) The provisions of this section shall not apply to taxicab drivers.

(N) The provisions of this section shall not apply where any employee of an airline certified by the federal or state government works over 40 hours but not more than 60 hours in a workweek due to a temporary modification in the employee's normal work schedule not required by the employer but arranged at the request of the employee, including but not limited to situations where the employee requests a change in days off or trades days off with another employee.

4. Minimum Wages

(A) Every employer shall pay to each employee wages not less than six dollars and twenty-five cents (\$6.25) per hour for all hours worked, effective January 1, 2001, and not less than six dollars and seventy-five cents (\$6.75) per hour for all hours worked, effective January 1, 2002, except:

LEARNERS: Employees during their first 160 hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than 85 percent of the minimum wage rounded to the nearest nickel.

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one (1)

hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Disabled Workers

(A) A license may be issued by the Division

authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

(B) A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

(C) All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5)

7. Records

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birth date, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in

operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage

No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

9. Uniforms and Equipment

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color. Note : This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

Effective Dates:

January 1, 2001

January 1, 2002

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards. Note : This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

(B) "Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(C) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

Lodging:

Room occupied alone	\$29.40 per week	\$31.75 per week
Room shared	\$24.25 per week	\$26.20 per week
Apartment -two-thirds (2/3) of the ordinary rental value, and in no event more than	\$352.95 per month	\$381.20 per week
Where a couple are both employed by the employer, two-thirds (2/3) of the ordinary rental value, and in no event more than	\$522.10 per month	\$563.90 per month

Meals:

Breakfast	\$2.25	\$2.45
Lunch	\$3.10	\$3.35
Dinner	\$4.15	\$4.50

(D) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received or lodging not used.

(E) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be

permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

(E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest

period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

13. Change Rooms and Resting Facilities

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean. Note : This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a

degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60°F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators

Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions

If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports (See California Labor Code, Section 1174(a))

19. Inspection (See California Labor Code, Section 1174)

20. Penalties (See California Labor Code, Section 1199)

(A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be

violated, the provisions of this order, shall be subject to the civil penalty of:

(1) Initial Violation -- \$50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

(2) Subsequent Violations -- \$100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

(3) The affected employee shall receive payment of all wages recovered.

(B) The labor commissioner may also issue citations pursuant to California Labor Code Section 1197.1 for non-payment of wages for overtime work in violation of this order.

21. Separability

If the application of any provision of this order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order

Every employer shall keep a copy of this order posted in an area frequented by employees where it may be easily read during the workday. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this order and make it available to every employee upon request.

<General Materials (GM) - References, Annotations, or Tables>

Note: Authority cited: Section 1173, Labor Code; and California Constitution, Article XIV, Section 1.
Reference: Sections 1182 and 1184, Labor Code.

8 CCR § 11090, 8 CA ADC § 11090

1CAC

8 CA ADC § 11090
END OF DOCUMENT

EXHIBIT C



OFFICIAL NOTICE

INDUSTRIAL WELFARE COMMISSION

ORDER NO. 9-2001

REGULATING

WAGES, HOURS AND WORKING CONDITIONS IN THE

TRANSPORTATION INDUSTRY

Effective July 1, 2004 as amended

*Sections 4(A) and 10(C) amended and republished by the Department of Industrial Relations,
effective January 1, 2007, pursuant to AB 1835, Chapter 230, Statutes of 2006*

This Order Must Be Posted Where Employees Can Read It Easily

Please Post With This Side Showing

OFFICIAL NOTICE

Effective July 1, 2004 as amended

Sections 4(A) and 10(C) amended and republished by the Department of Industrial Relations,
effective January 1, 2007, pursuant to AB 1835, Chapter 230, Statutes of 2006



INDUSTRIAL WELFARE COMMISSION ORDER NO. 9-2001 REGULATING WAGES, HOURS AND WORKING CONDITIONS IN THE TRANSPORTATION INDUSTRY

TAKE NOTICE: To employers and representatives of persons working in industries and occupations in the State of California: The Department of Industrial Relations amends and republishes the minimum wage and meals and lodging credits in the Industrial Welfare Commission's Orders as a result of legislation enacted (AB 1835, Ch. 230, Stats of 2006, adding sections 1182.12 and 1182.13 to the California Labor Code.) The amendments and republishing make no other changes to the IWC's Orders.

1. APPLICABILITY OF ORDER

This order shall apply to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 of this order shall not apply to persons employed in administrative, executive, or professional capacities. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

(1) Executive Exemption. A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(2) Administrative Exemption. A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(i) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his/her employer's customers; or

(ii) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

(d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(e) Who executes under only general supervision special assignments and tasks; and

(f) Who is primarily engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(3) Professional Exemption. A person employed in a professional capacity means any employee who meets *all* of the following requirements:

(a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b).

(d) Who earns a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515 (c) as 40 hours per week.

(e) Subparagraph (b) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this wage order: 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

(f) Notwithstanding the provisions of this subparagraph, pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subparagraph unless they individually meet the criteria established for exemption as executive or administrative employees.

(g) Subparagraph (f) above shall not apply to the following advanced practice nurses:

(i) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.

(ii) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.

(iii) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.

(iv) Nothing in this subparagraph shall exempt the occupations set forth in clauses (i), (ii), and (iii) from meeting the requirements of subsection 1(A)(3)(a)-(d) above.

(h) Except, as provided in subparagraph (i), an employee in the computer software field who is paid on an hourly basis shall be exempt, if *all* of the following apply:

(i) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(ii) The employee is primarily engaged in duties that consist of one or more of the following:

—The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

—The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

—The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(iii) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(iv) The employee's hourly rate of pay is not less than forty-one dollars (\$41.00). The Division of Labor Statistics and Research shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.*

(i) The exemption provided in subparagraph (h) does not apply to an employee if *any* of the following apply:

(i) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(ii) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(iii) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

*Pursuant to Labor Code section 515.5, subdivision (a)(4), the Division of Labor Statistics and Research, Department of Industrial Relations, has adjusted the minimum hourly rate of pay specified in this subdivision to be \$49.77, effective January 1, 2007. This hourly rate of pay is adjusted on October 1 of each year to be effective on January 1, of the following year, and may be obtained at www.dir.ca.gov/IWC or by mail from the Department of Industrial Relations.

(iv) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(v) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(vi) The employee is engaged in any of the activities set forth in subparagraph (h) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

(B) Except as provided in Sections 1, 2, 4, 10, and 20, and with regard to commercial drivers, Sections 11 and 12, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district. The application of Sections 11 and 12 for commercial drivers employed by governmental entities shall become effective July 1, 2004 or following the expiration date of any valid collective bargaining agreement applicable to such commercial drivers then in effect but, in any event, no later than August 1, 2005. Notwithstanding Section 21, the application of Sections 11 or 12 to public transit bus drivers shall be null and void in the event the IWC or any court of competent jurisdiction invalidates the collective bargaining exemption established by Sections 11 or 12 for those drivers.

(C) The provisions of this order shall not apply to outside salespersons.

(D) The provisions of this order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(E) Except as provided in Sections 4, 10, 11, 12, and 20 through 22, this order shall not be deemed to cover those employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act, 45 U.S.C. Sections 151 et seq.

(F) The provisions of this Order shall not apply to any individual participating in a national service program, such as AmeriCorps, carried out using assistance provided under Section 12571 of Title 42 of the United States Code. (See Stats. 2000, ch. 365, amending Labor Code § 1171.)

2. DEFINITIONS

(A) An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

(B) "Commission" means the Industrial Welfare Commission of the State of California.

(C) "Commercial driver" means an employee who operates a vehicle described in subdivision (b) of Section 15210 of the Vehicle Code.

(D) "Division" means the Division of Labor Standards Enforcement of the State of California.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(I) "Minor" means, for the purpose of this order, any person under the age of 18 years.

(J) "Outside salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(L) "Public Transit Bus Driver" means a commercial driver who operates a transit bus and is employed by a governmental entity.

(M) "Shift" means designated hours of work by an employee, with a designated beginning time and quitting time.

(N) "Split shift" means a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(O) "Teaching" means, for the purpose of Section 1 of this order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(P) "Transportation Industry" means any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection therewith; and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles.

(Q) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

(R) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day.

(S) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. HOURS AND DAYS OF WORK

(A) Daily Overtime-General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek.

Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half ($1\frac{1}{2}$) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth ($1/40$) of the employee's weekly salary.

(B) Alternative Workweek Schedules

(1) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a 40 hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by the agreement up to 12 hours a day or beyond 40 hours per week shall be paid at one and one-half ($1\frac{1}{2}$) times the employee's regular rate of pay. All work performed in excess of 12 hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek agreement shall be paid at double the employee's regular rate of pay. Any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift. Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime. No hours paid at either one and one-half ($1\frac{1}{2}$) or double the regular rate of pay shall be included in determining when 40 hours have been worked for the purpose of computing overtime compensation.

(2) If an employer whose employees have adopted an alternative workweek agreement permitted by this order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half ($1\frac{1}{2}$) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee's regular rate of pay for all hours worked in excess of 12 hours for the day the employee is required to work the reduced hours.

(3) An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

(4) An employer shall explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision (j) of Section 12940 of the Government Code.

(5) An employer shall make a reasonable effort to find a work schedule not to exceed eight (8) hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this section and who is unable to work the alternative workweek schedule established as the result of that election.

(6) An employer shall be permitted, but not required, to provide a work schedule not to exceed eight (8) hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election.

(7) Arrangements adopted in a secret ballot election held pursuant to this order prior to 1998, or under the rules in effect prior to 1998, and before the performance of the work, shall remain valid after July 1, 2000 provided that the results of the election are reported by the employer to the Division of Labor Statistics and Research by January 1, 2001, in accordance with the requirements of subsection (C) below (Election Procedures). If an employee was voluntarily working an alternative workweek schedule of not more than ten (10) hours a day as of July 1, 1999, that alternative workweek schedule was based on an individual agreement made after January 1, 1998 between the employee and employer, and the employee submitted, and the employer approved, a written request on or before May 30, 2000 to continue the agreement, the employee may continue to work that alternative workweek schedule without payment of an overtime rate of compensation for the hours provided in the agreement. The employee may revoke his/her voluntary authorization to continue such a schedule with 30 days written notice to the employer. New arrangements can only be entered into pursuant to the provisions of this section.

(C) Election Procedures

Election procedures for the adoption and repeal of alternative workweek schedules require the following:

(1) Each proposal for an alternative workweek schedule shall be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(2) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds ($2/3$) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees' work site. For purposes of this subsection, "affected employees in the work unit" may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(3) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least 14 days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. An employer shall provide that disclosure in a non-English language, as well as in English, if at least five (5) percent of the affected employees primarily speak that non-English language. The employer

shall mail the written disclosure to employees who do not attend the meeting. Failure to comply with this paragraph shall make the election null and void.

(4) Any election to establish or repeal an alternative workweek schedule shall be held at the work site of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section. Upon a complaint by an affected employee, and after an investigation by the labor commissioner, the labor commissioner may require the employer to select a neutral third party to conduct the election.

(5) Any type of alternative workweek schedule that is authorized by the California Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within 60 days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

(6) Only secret ballots may be cast by affected employees in the work unit at any election held pursuant to this section. The results of any election conducted pursuant to this section shall be reported by the employer to the Division of Labor Statistics and Research within 30 days after the results are final, and the report of election results shall be a public document. The report shall include the final tally of the vote, the size of the unit, and the nature of the business of the employer.

(7) Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least 30 days after the announcement of the final results of the election.

(8) Employers shall not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. No employees shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. However, nothing in this section shall prohibit an employer from expressing his/her position concerning that alternative workweek to the affected employees. A violation of this paragraph shall be subject to California Labor Code Section 98 et seq.

(D) One and one-half (1½) times a minor's regular rate of pay shall be paid for all work over 40 hours in any workweek except minors 16 or 17 years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsection (A) or (B) and (C) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from \$500 to \$10,000 as well as to criminal penalties. Refer to California Labor Code Sections 1285 to 1312 and 1390 to 1399 for additional restrictions on the employment of minors and for descriptions of criminal and civil penalties for violation of the child labor laws. Employers should ask school districts about any required work permits.)

(E) An employee may be employed on seven (7) workdays in one workweek when the total hours of employment during such workweek do not exceed 30 and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

(H) Except as provided in subsections (E) and (G), this section shall not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.

(I) Notwithstanding subsection (H) above, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement pertaining to the hours of work of the employees, the requirement regarding the equivalent of one (1) day's rest in seven (7) (see subsection (G) above) shall apply, unless the agreement expressly provides otherwise.

(J) If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that makeup work time, if performed in the same workweek in which the work time was lost, may not be counted toward computing the total number of hours worked in a day for purposes of the overtime requirements, except for hours in excess of 11 hours of work in one (1) day or 40 hours of work in one (1) workweek. If an employee knows in advance that he/she will be requesting makeup time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make up work time for up to four (4) weeks in advance; provided, however, that the makeup work must be performed in the same week that the work time was lost. An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this subsection. While an employer may inform an employee of this makeup time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make up the work hours within the same workweek pursuant to this subsection.

(K) The daily overtime provision of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for 24-hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one (1) hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule.

(L) The provisions of this section are not applicable to employees whose hours of service are regulated by:

(1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or;

(2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and the following sections, regulating hours of drivers.

(M) The provisions of this section shall not apply to taxicab drivers.

(N) The provisions of this section shall not apply where any employee of an airline certified by the federal or state government works over 40 hours but not more than 60 hours in a workweek due to a temporary modification in the employee's normal work schedule not required by the employer but arranged at the request of the employee, including but not limited to situations where the employee requests a change in days off or trades days off with another employee.

4. MINIMUM WAGES

(A) Every employer shall pay to each employee wages not less than seven dollars and fifty cents (\$7.50) per hour for all hours worked, effective January 1, 2007, and not less than eight dollars (\$8.00) per hour for all hours worked, effective January 1, 2008, except:

LEARNERS: Employees during their first 160 hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than 85 percent of the minimum wage rounded to the nearest nickel.

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one (1) hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. REPORTING TIME PAY

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. LICENSES FOR DISABLED WORKERS

(A) A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

(B) A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

(C) All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5)

7. RECORDS

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birth date, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

8. CASH SHORTAGE AND BREAKAGE

No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

9. UNIFORMS AND EQUIPMENT

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

NOTE: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

NOTE: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. MEALS AND LODGING

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

(B) "Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(C) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 2007	Effective January 1, 2008
Lodging:		
Room occupied alone	\$35.27 per week	\$37.63 per week
Room shared	\$29.11 per week	\$31.06 per week
Apartment—two-thirds (2/3) of the ordinary rental value, and in no event more than	\$423.51 per month	\$451.89 per month
Where a couple are both employed by the employer, two-thirds (2/3) of the ordinary rental value, and in no event more than	\$626.49 per month	\$668.46 per month
Meals:		
Breakfast	\$2.72	\$2.90
Lunch.....	\$3.72	\$3.97
Dinner.....	\$5.00	\$5.34

(D) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received or lodging not used.

(E) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. MEAL PERIODS

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee

with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

(E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

(F) The section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the agreement expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

12. REST PERIODS

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

(C) This section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the agreement expressly provides for rest periods for those employees, final and binding arbitration of disputes concerning application of its rest period provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

13. CHANGE ROOMS AND RESTING FACILITIES

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. SEATS

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. TEMPERATURE

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. ELEVATORS

Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. EXEMPTIONS

If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature;

or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. FILING REPORTS

(See California Labor Code, Section 1174(a))

19. INSPECTION

(See California Labor Code, Section 1174)

20. PENALTIES

(See California Labor Code, Section 1199)

(A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:

(1) Initial Violation — \$50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

(2) Subsequent Violations — \$100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

(3) The affected employee shall receive payment of all wages recovered.

(B) The labor commissioner may also issue citations pursuant to California Labor Code Section 1197.1 for non-payment of wages for overtime work in violation of this order.

21. SEPARABILITY

If the application of any provision of this order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. POSTING OF ORDER

Every employer shall keep a copy of this order posted in an area frequented by employees where it may be easily read during the workday. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this order and make it available to every employee upon request.

QUESTIONS ABOUT ENFORCEMENT of the Industrial Welfare Commission orders and reports of violations should be directed to the Division of Labor Standards Enforcement. A listing of the DLSE offices is on the back of this wage order. Look in the white pages of your telephone directory under CALIFORNIA, State of, Industrial Relations for the address and telephone number of the office nearest you. The Division has offices in the following cities: Bakersfield, El Centro, Eureka, Fresno, Long Beach, Los Angeles, Oakland, Redding, Sacramento, Salinas, San Bernardino, San Diego, San Francisco, San Jose, Santa Ana, Santa Barbara, Santa Rosa, Stockton, Van Nuys.

SUMMARIES IN OTHER LANGUAGES

The Department of Industrial Relations will make summaries of wage and hour requirements in this Order available in Spanish, Chinese and certain other languages when it is feasible to do so. Mail your request for such summaries to the Department at:
P.O. Box 420603, San Francisco, CA 94142-0603.

RESUMEN EN OTROS IDIOMAS

El Departamento de Relaciones Industriales confeccionará un resumen sobre los requisitos de salario y horario de esta Disposición en español, chino y algunos otros idiomas cuando sea posible hacerlo. Envíe por correo su pedido por dichos resúmenes al Departamento a: P.O. Box 420603, San Francisco, CA 94142-0603.

其它文字的摘錄

工業關係處將摘錄本規則中有關工資和工時的規定，用西班牙文、中文印出。其它文字如有需要，也將同樣辦理。如果您需要，可以來信索閱，請寄到：
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142-0603

All complaints are handled confidentially. For further information or to file your complaints, contact the State of California at the following department offices:

Division of Labor Standards Enforcement (DLSE)

For labor law information and assistance for your area call the pre-recorded information lines in **bold** below. If the information you need is not provided in the pre-recorded message, please call the general office number listed.

BAKERSFIELD

Division of Labor Standards Enforcement
5555 California Ave., Suite 200
Bakersfield, CA 93309
661-395-2710
661-859-2462

EL CENTRO

Division of Labor Standards Enforcement
1550 W. Main St.
El Centro, CA 92643
760-353-0607
760-353-2544

EUREKA

Division of Labor Standards Enforcement
619 Second Street, Room 109
Eureka, CA 95501
707-445-6613
707-441-4604

FRESNO

Division of Labor Standards Enforcement
770 E. Shaw Ave., Suite 315
Fresno, CA 93710
559-244-5340
559-248-8398

LONG BEACH

Division of Labor Standards Enforcement
300 Oceangate, 3rd Floor
Long Beach, CA 90802
562-590-5048
562-491-0160

LOS ANGELES

Division of Labor Standards Enforcement
320 W. Fourth St, Suite 450
Los Angeles, CA 90013
213-620-6330
213-576-6227

OAKLAND

Division of Labor Standards Enforcement
1515 Clay Street, Room 801
Oakland, CA 94612
510-622-3273
510-622-2660

REDDING

Division of Labor Standards Enforcement
2115 Civic Center Drive, Room 17
Redding, CA 96001
530-225-2655
530-229-0565

SACRAMENTO

Division of Labor Standards Enforcement
2031 Howe Ave, Suite 100
Sacramento, CA 95825
916-263-1811
916-263-5378

SALINAS

Division of Labor Standards Enforcement
1870 N. Main Street, Suite 150
Salinas, CA 93906
831-443-3041
831-443-3029

SAN BERNARDINO

Division of Labor Standards Enforcement
464 West 4th Street, Room 348
San Bernardino, CA 92401
909-383-4334
909-889-8120

SAN DIEGO

Division of Labor Standards Enforcement
7575 Metropolitan, Room 210
San Diego, CA 92108
619-220-5451
619-682-7221

SAN FRANCISCO

Division of Labor Standards Enforcement
455 Golden Gate Ave, 10th Floor
San Francisco, CA 94102
415-703-5300
415-703-5444

SAN FRANCISCO – HEADQUARTERS

Division of Labor Standards Enforcement
455 Golden Gate Ave. 9th Floor
San Francisco, CA 94102
415-703-4810

SAN JOSE

Division of Labor Standards Enforcement
100 Paseo De San Antonio, Room 120
San Jose, CA 95113
408-277-1266
408-277-3711

SANTA ANA

Division of Labor Standards Enforcement
605 West Santa Ana Blvd , Bldg 28
Santa Ana, CA 92701
714-558-4910
714-558-4574

SANTA BARBARA

Division of Labor Standards Enforcement
411 E. Canon Perdido, Room 3
Santa Barbara, CA 93101
805-568-1222
805-965-7214

SANTA ROSA

Division of Labor Standards Enforcement
50 "D" Street, Suite 360
Santa Rosa, CA 95404
707-576-2362
707-576-2459

STOCKTON

Division of Labor Standards Enforcement
31 E. Channel Street, Room 317
Stockton, CA 95202
209-948-7771
209-941-1906

VAN NUYS

Division of Labor Standards Enforcement
6150 Van Nuys Boulevard, Room 206
Van Nuys, CA 91401
818-901-5315
818-908-4556

EMPLOYERS: Do not send copies of your alternative workweek election ballots or election procedures

Only the results of the alternative workweek election shall be mailed to:

Department of Industrial Relations
Division of Labor Statistics and Research
P.O. Box 420603
San Francisco, CA 94142-0603
(415) 703-4780

Prevailing Wage Hotline (415) 703-4774